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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1287

ASHLAND COAL AND ICE COMPANY, INC., ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

JURISDICTIONAL STATEMENT BY PLAINTIFFS UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

(Filed April 3rd, 1945)

Plaintiffs respectfully present the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment or decree in the above-entitled cause sought to be reviewed.

A. Statutory Provisions

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) Act of June 13, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38, Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, sec. 35, 31 Stat. 85; April 30, 1900, c. 339, sec. 86, 31 Stat. 158; March 3, 1909, c. 269, sec. 1, 35 Stat. 838; March 3, 1911, c. 231, secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, sec. 2, 38 Stat. 804; February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

B. Date of the Judgment or Decree Sought to Be Reviewed and the Date upon Which the Application for Appeal Was Presented.

The decree sought to be reviewed was entered on February 14, 1945. The petition for appeal was presented and allowed on April 3, 1945, together with an assignment of errors.

C. Nature of Cause and of Rulings Below

This is an appeal from the final decree of the District Court of the United States for the Eastern District of Virginia, Richmond Division, entered February 14, 1945. By said decree the Court ordered, adjudged and decreed that the suit be dismissed. By said suit plaintiffs had prayed

the Court to suspend and annul that portion of the report and order of the Interstate Commerce Commission dated November 8, 1943, and styled *Ashland Coal & Ice Co., Inc.* v. *Atlantic Coast Line R. Co.*, 256, I. C. C. 429, under and by virtue of which the Commission found that the rates assailed in the complaint before it were not unreasonable as applied to shipments moving in the past and during the statutory period of limitations provided by law.

The litigation before the Interstate Commerce Commission began on February 1, 1937, with the filing of a complaint alleging that in the past and for the future the rates charged by the defendant rail carriers for the transportation of coal, in carloads, from the mines to destinations in the eastern portion of the State of Virginia were and would be unreasonable under section 1 of the interstate commerce act. Issue was joined, hearing had in May, 1937, and upon the evidence adduced therein the Examiner of the Commission recommended a reduction of 25 cents per ton for the future and reparation on past shipments in that amount. Exceptions and replies were filed and the parties were heard in oral argument before Division 4 of the Commission. In a report of that Division dated July 3, 1940 (*Ashland Coal & Ice Co., Inc.* v. *Atlantic Coast Line R. Co.*, 241 I. C. C. 120), the recommendations of the Examiner were not followed and the complaint was dismissed. Upon petition by complainants the case was reopened and set down for further hearing. At the conclusion of such hearing the same Trial Examiner recommended a reduction of 20 cents per ton to the western portion of the destination groups and reparation on past shipments. To the eastern portion of the groups he recommended that the rates be found not unreasonable. His recommendations were followed by the Commission on exceptions and reargument, except that it denied reparation on past shipments.

The principal grounds stated in the complaint in this Court are (a) that in concluding that, based on evidence addressed and relating to conditions in the years 1935 to 1939, the assailed rate "is much too high" and in declaring that for that period it was not unreasonable, while at the same time declaring and finding in the same report and upon the same evidence that it became unreasonable in 1944, and for the future, the Interstate Commerce Commission misconstrued and misapplied its power under the statute by (b) arbitrarily substituting a supposed "rule of damage" for its primary function of rate making; (c) by failing to recognize that the interstate commerce act declares a single standard of reasonableness which does not differ as between the past and the present or future; (d) and by making two findings, one of reasonableness and one of unreasonableness as to the same rate and on the same mass of evidence (e) without making the essential findings of fact upon which such opposing conclusions of an administrative body should rest.

The grounds of complaint are predicated principally upon the propositions that while there may be valid reasons for and evidence to support a finding that an assailed rate is not unreasonable in the past but that it should be declared unreasonable for future application, or vice versa, the Interstate Commerce Commission, before reaching such a conclusion must (a) have substantial evidence to support it and (b) must make the essential preliminary or quasi-jurisdictional findings to justify its opposing conclusions. The Interstate Commerce Commission is without statutory authority, on complaint properly before it, to make what amounts to a conditional finding that rates for the future will be reduced contingent upon its right to "refuse to find unreasonableness in the past".

The decision of the lower Court fails to recognize the essential character of this suit. It is true that the Inter-

state Commerce Commission has original and exclusive jurisdiction on the question of reasonableness and that its conclusions, if based on substantial evidence, are conclusive upon the Courts. (*Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426). It is true that if in any given case the Commission were to conclude on substantial evidence, that rates are not unreasonable either as to the past or future, its conclusions would not be open to review. (Ibid.) It is true that in any given case there might be logical grounds and substantial evidence upon which the Commission might reasonably conclude that different findings are justified as affecting the past and the future. (*Baer Bros. Mercantile Co.* v. *Denver & R. G. W. R. Co.*, 233 U. S. 479). It is true, also that if the Commission, on substantial evidence, concludes that reparation in a certain amount is due upon complaint presented to it the courts are powerless to change the amount of the award except as to such changes which might fall within the range of contestation provided for in *Mitchell Coal & Coke Co.* v. *P. R. R. Co.*, 230 U. S. 247. (*Baltimore & O. R. Co.* v. *Brady*, 288 U. S. 448).

This suit, however, does not fall within any of the above classifications. Its essence is that the Interstate Commerce Commission acting upon a single mass of evidence which was addressed to conditions as of 1935 to 1939, has concluded that during that period the rates were not unreasonable but that upon the same mass of evidence the rates became unreasonable from and after February 15, 1944. In reaching these totally divergent conclusions on the same evidence the Commission did not recite evidentiary facts showing a bona fide change in conditions nor did it make the essential quasi-jurisdictional findings which must serve as the basis for its ultimate finding that under a single standard of reasonableness the assailed rates are (or were) both reasonable and unreasonable. It did not spell out

its preliminary findings "with the simplicity and clearness through which a halting impression ripens into reasonable certitude." (*United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 511.) Instead it relied upon an assumed "principle" lifted from the context of one of its decisions made in 1928 and in connection with a wholly unrelated state of facts and upon the theory as expressed by its counsel at argument before the District Court that it has power to "condition its order reducing rates for the future upon its ability to deny reparation for the past." As stated, the act without distinction as between the past and the future, sets a single standard, i. e., that rates must be "just and reasonable" and contains no authority for such "conditional" findings. The distinction between the quasi-judicial function of considering past reasonableness and the quasi-legislative function of declaring reasonableness for the future derives solely from the fact that the former function is directly concerned with an award of pecuniary damage (*Southern Pac. Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531) and not, as assumed by the Commission and the lower Court, upon a difference in the art or standards of rate making or in any supposed discretion vested in the Commission.

The decision of the lower Court, if allowed to stand, will have a profound effect upon the future administration of the statutory requirement that rates for the transportation of property must be "just and reasonable" and the statutory declaration that rates which do not meet that standard are "prohibited and declared unlawful." The action of the Interstate Commerce Commission in "refusing to find unreasonableness" in the past has resulted in a loss to the shippers of approximately two million ($2,000,000) dollars due principally to the facts that (a) a tremendous volume of coal has moved under the assailed rates and (b) that the Interstate Commerce Commission had the complaint under

consideration for more than six years before reaching a decision and more than eight years from the beginning of the statutory period. But entirely apart from the substantial amount of money involved, important principles governing sound administration are at stake.

If the decision of the lower Court is allowed to stand it will be tantamount to a judicial approval of the following principles: (1) By denying jurisdiction over the subject matter of our complaint it will amount to a return to the "negative order" dostrine first announced in *Procter & Gamble* v. *United States,* 225 U. S. 282, and specifically rejected as a "touchstone of jurisdiction" in *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125; (2) it will vest in the Interstate Commerce Commission an absolute discretion in the future so far as questions of past reasonableness are concerned under which that Commission will be authorized to operate differently upon the same mass of evidence without making any specific findings of conditions or change of conditions in support of such action; (3) it will bestow upon Commission decisions a degree of finality in circumstances and under a philosophy which was rejected in some of the earliest cases establishing the doctrine (*Interstate Commerce Commission* v. *Illinois Central R. Co.,* 215 U. S. 452, 470; *Intermountain Rate Case,* 234 U. S. 476, 491); (4) it will vest in the Commission, and without the right of review, the power to reach a dual conclusion upon a single standard, and on the same mass of evidence by merely making a finding "in the language of the statute" and without making the necessary quasi-jurisdictional findings to support its conclusion, contrary to the principles announced in *Florida* v. *United States,* 282 U. S. 194; *United States* v. *Baltimore & O. R. Co.,* 293 U. S. 454; *United States* v. *Chicago, M. St. P. & P. R. Co.,* 294 U. S. 499; *City of Yonkers* v. *United States,* 88 L. Ed. (Ad. Op.) 241; (5) it will place in the Commission the power to declare

that whether a rate is unreasonable in the past depends not upon the single standard of reasonableness declared in the statute or upon the ordinary considerations involved in the art of rate making, but upon whether the carriers "believed" the rate unreasonable or whether the shipper was really damaged in a "special" sense, contrary to the principles announced in *Southern P. Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531; and *Louisville & N. R. Co.* v. *Sloss-Sheffield-Steel & Iron Co.*, 269 U. S. 217; (6) it will accord to the Commission a power, not delegated by Congress, to "condition" an order reducing rates for the future upon "its ability to deny reparation in the past."

D. Cases Sustaining the Jurisdiction of the Supreme Court of the United States on Appeal

American Furniture Co. v. *Norfolk & W. Ry. Co.*, 34 Fed. Supp. 647;

Anadarko Cotton Oil Co. v. *Atchison, T. & S. F. Ry. Co.*, 20 I. C. C. 43 (1910);

Arizona Grocery Co. v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 382, 384 (1932);

Atchison, T. & S. F. Ry. Co. v. *United States*, 284 U. S. 248 (1931);

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City of Harrisonburg v. *Chesapeake & O. Ry. Co.*, 34 Fed. Supp. 641;

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Fieldale Mills v. *Norfolk & W. Ry. Co.*, 192 I. C. C. 471;

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Mathieson Alkali Works, Inc. v. *Carolina C. & O. Ry. Co.*, 77 I. C. C. 150;

Merchants & Planters Plant F. Co. v. *Chicago, R. I. & P. Co.*, 171 I. C. C. 74, 77;

Mississippi Valley Barge Line Co. v. *United States,* 292 U. S. 282 (1934);

Mitchell Coal & Coke Co., v. *P. R. R. Co.*, 230 U. S. 247 (1913);

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New York, N. H. & H. R. Co. v. *Interstate Commerce Commission*, 200 U. S. 361, 401;

A. S. Nowlin & Co. v. *Chesapeake & O. Ry. Co.*, 213 I. C. C. 101;

Parkersburg Rig & Reel Co. v. *Chicago, R. I. & P. Ry. Co.*, 182 I. C. C. 503, 509, 510;

Perry v. *Florida Central & Peninsular R. Co.*, 3 I. C. C. 740, 749 (1892);

Pitzer Transfer Corp. v. *Norfolk & W. Ry. Co.*, 10 Fed. Supp. 436;

Plymouth Coal Co. v. *P. R. R. Co.*, 56 I. C. C. 699 (1920);

Procter & Gamble v. *United States*, 225 U. S. 282 (1912);

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Texas & Pacific Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907);

Transcontinental Oil Co. v. *Atchison T. & S. F. Ry. Co.*, 152 I. C. C. 402, 404;

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United States v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499;
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Virginian Ry. Co. v. *United States*, 272 U. S. 658;
Virginia State Corp. Comm. v. *Norfolk & W. Ry. Co.*, 190 I. C. C. 325;
L. D. Wingfield-Hatcher Coal Co. v. *Chesapeake & O. Ry. Co.*, 191 I. C. C. 644.

E. Decree and Opinion of the District Court

Appended to this statement are copies of the opinion and final decree of the District Court.

Plaintiffs, therefore, respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

(Sgd.) WALTER M. EVANS,
(Sgd.) HARRY C. AMES,
Attorneys for Plaintiffs.

APPENDIX "A"

Opinion of the Court

(Filed February 5th, 1945)

Civil Action No. 337

ASHLAND COAL AND ICE COMPANY, INC., ET AL., Plaintiffs,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET ALS., Defendants

Civil Action to Set Aside an Order of the Interstate Commerce Commission.

(Argued December 29, 1944, Decided ——)

Before Dobie, Circuit Judge, and Pollard and Hutcheson, District Judges.

Walter M. Evans, Esq.,
Harry C. Ames, Esq.,
Counsel for the Plaintiffs.
Robt. L. Pierce, Esq.,
Special Asst. to Atty-Genl.,
Harry H. Holt, Jr., Esq.,
U. S. Attorney,
John V. Cogbill, Esq.,
Asst. U. S. Atty.,
Counsel for United States.
Edward M. Reidy, Esq., Asst. Chief Counsel for Interstate Com. Comm.
Frank W. Gwathmey, Esq.,
D. Lynch Younger, Esq.,
Charles Clark, Esq.,
John C. Donnally, Esq.,
Horace L. Walker, Esq.,
Henry W. Oppenheimer, Esq.,
Lawrence Chaffee, Esq.,
Counsel for Intervenors.

DOBIE, *Circuit Judge:*

This is a suit, under 28 U. S. C. A. sub-Section 41(28), 43-47(a), to set aside that part of the order of the Interstate Commerce Commission which denied reparation to the plaintiffs for the past.

The Commission's order (this part is not attacked in the instant suit) reduced freight rates on shipments of coal to points in certain parts (the Western portion) of the designated shipping area. As to the past, however, the Commission decided that these rates were not unreasonable. The railroads which had been made defendants in the proceedings before the Commission were permitted, by order of the District Court, to intervene as parties defendant in the instant suit.

(1) Jurisdiction.

We must first consider the contention of the defendants that we have no jurisdiction to entertain the present suit. The ground of this contention is that this is plainly a suit to set aside an order of the Commission denying reparation to the plaintiffs; and that, under the Interstate Commerce Act, Sec. 9, 49 U. S. C. A. Sec. 9, a specially organized three-judge District Court of the United States is powerless to entertain such a suit. We believe that this contention is sound and that this Court lacks jurisdiction.

Under Section 8 of the Interstate Commerce Act (49 U. S. C. A. Sec. 8), a common carrier by railroad committing an act, matter or thing prohibited by the Act is made liable in damages to the person or persons thereby injured. Section 9 of the Act (49 U. S. C. A. Sec. 9) provides that any person so damaged may *either* make complaint to the Interstate Commerce Commission *or* bring suit in a federal court for the recovery of damages; but this section contains the further provision: "such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." Under Section 16 of the Act (49 U. S. C. A. Sec. 16), the Commission is authorized to award damages upon such a complaint.

The cases seem to establish the rule that where a litigant applies to the Commission for reparation, which has been denied by the Commission, an ordinary civil action cannot, on the same claim or cause of action, be entertained by an ordinary one-judge federal district court. George A. Hormel & Co. v. Chicago, Milwaukee & St. Paul Ry. Co., 283 Fed. 915, 918 (C. C. A. 8, opinion by Circuit Judge Lewis); Bartlesville Zinc Co. v. Mellon, 56 F. (2d) 154, 156 (C. C. A. 7, opinion by District Judge Lindley). See, also, the opinion of Mr. Justice Butler in Baltimore & Ohio Rr. Co. v. Brady, 288 U. S. 448, 457-458.

This brings us to the jurisdictional problem of the case before us. Can a party who has sought reparation before the Commission and has been denied such reparation by the Commission, bring a civil action (under the Urgent Deficiencies Act) in a specially organized three-judge district court for the purpose of setting aside the Commission's order? Section 9 of the Interstate Commerce Act (49 U. S. C. A. Sec. 9), we think, as interpreted by the federal courts, is an effective bar to such a civil action.

Mr. Justice Sutherland seems to have dealt rather effectively with this problem in the closing words of his opinion in Standard Oil Co. v. United States, 283 U. S. 235, 240-241:

> "But putting the foregoing grounds entirely aside, and assuming the correctness of appellant's contentions to the contrary, nevertheless, having regard to the remedy invoked and the relief sought by the petition, we think the district court was without jurisdiction. Section 9 of the Interstate Commerce Act, c. 104, 24 Stat. 379, 382; U. S. C., Title 49 Sec. 0, provides that a claim for damages against a common carrier may be brought before the Commission by complaint, or by an action in a federal district court of competent jurisdiction, but that the claimant or claimants 'shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.' Having elected to proceed and having proceeded to a determination before the Commission, appellant was, by force of this provision, precluded from

seeking reparation upon the same claims by the alternative method of procedure. Compage Geo. A. Hormel & Co. v. Chicago, M. & St. P. Ry. Co., 283 Fed. 915, 918.

"It is true that appellant sought to enjoin and set aside the order of the Commission, but only as a preliminary step toward obtaining, by a decision upon the merits of the claims, the same relief it failed to secure from the Commission. This is made clear by the prayer of the petition, already quoted, namely, that the Commission be directed by the court to grant the prayer of the complaints; find that petition has been overcharged to the extent set forth; and order a further hearing, if necessary, to determine the amount to be paid by way of reparation. It is of no importance that the adjudication sought is to take the form of a direction to the Commission to grant the prayer of the complaints filed before that body, etc., instead of a plenary judgment to the same end, for the prayer in that form is nothing less than an attempt to avoid the statute by indirection. In substance and in principle the claim before the Commission and the claim before the court were the same, and the district court was without authority to entertain the controversy. It is hardly necessary to add that, since Sec. 9 contemplates that the jurisdiction in such cases shall be exercised by the federal district courts as ordinarily constituted, the specially constituted court is without jurisdiction to dispose of an action under that section even if brought in the district court in the first instance."

True it is that in Rochester Telephone Corporation v. United States, 307 U. S. 125, the Supreme Court repudiated the "negative order doctrine" as the touchstone of judicial reviewability. But in a note (#23) Mr. Justice Frankfurter (307 U. S. at page 140) was careful to point out:

"Standard Oil Co. v. United States held not reviewable the action of the Commission refusing to grant reparation, but the main *basis of the decision was not the 'negative order' doctrine,* but the *statutory scheme dealing with reparations.*" (Italics ours.)

Thus, from our standpoint, the binding authority of the Standard Oil case was not impaired by the Rochester Telephone case.

No less emphatic was the language of District Judge Fee, speaking for a three-judge district court, in Atlantic Lumber Corporation v. Southern Pacific Co., 47 F. Supp. 511, 513, in which the Standard Oil case, the Rochester Telephone case (and other cases in this field) were analyzed and discussed:

> "The power to give reparations in rate cases is of statutory genesis and was unknown to the common law. It is a discretionary authority reposed in the Commission in order to round out the scheme of regulation. Congress endowed with administrative finality such orders of the Commission.
>
> "Jurisdiction of the District Court, sitting with three judges, in this type of situation is only to 'enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.' There are many orders of the Commission which cannot be reviewed by such a court. Although the earlier cases used phraseology indicating that such a court had no jurisdiction to set aside a 'negative order which denies relief without more, compels nothing requiring enforcement, and contemplates no action susceptible of being stayed,' it was found that this formula was too loosely stated for specific application. However, the courts constituted as this one is, have no jurisdiction to review an order failing to allow reparation. The purpose of Congress in constituting the Commission and in the various acts giving jurisdiction was the establishment of uniformity of administration in light of the declared policy upon these very matters.
>
> "The prescription of reasonable and lawful rates for the future might be a basis for action, except that plaintiff obviously does not desire to seek annulment of the order upon the theory that relief should be granted as to this feature."

Even more sweeping is the language of Circuit Judge Parker, in Brady v. Interstate Commerce Commission, 43 F. (2d) 847, 850-851:

"Amending section 15 of the Interstate Commerce Act, the Act June 29, 1906 provided that the Commission should determine just and reasonable maximum rates and just, fair and reasonable practices with respect to transportation and issue orders to carriers with respect thereto, and that all orders of the Commission, except orders for the payment of money, should take effect within such reasonable time, not less than thirty days, as might be prescribed by the Commission, unless same should be suspended or set aside by the Commission or by a court of competent jurisdiction. 34 Stat. 598 Sec. 4 (49 U. S. C. A. Sec. 15). By the amendment of section 16 (34 Stat. 590, Sec. 5 (49 U. S. C. A. Sec. 16)), it drew a clear distinction between reparation orders and other orders of the Commission, by providing for suit in the Circuit Courts to collect damages in the case of reparation orders not complied with, and for application to a court of equity for the enforcement of other orders. Following this was the provision for suits to enjoin, set aside, annul, or suspend orders of the Commission; and when all of these provisions are considered together, we think it clear that the jurisdiction thus conferred was intended to relate to quasi legislative orders, in which the public at large are interested, disobedience of which is made punishable, and the suspension of which is expressly provided for by section 15 of the act, and not to reparation orders which affect only the rights of private individuals, have no binding force and do not subject anyone to punishment for disobedience. For distinction between the two kinds of orders, see Baer Bros. v. Denver, etc., R. Co., 233 U. S. 479, 34 S. Ct. 641, 58 L. Ed. 1055.

"This view is strengthened when it is remembered that the Act of June 18, 1910, creating the Commerce Court, 36 Stat. 539, vested that court with exclusive jurisdiction of suits to enjoin or set aside orders of the Commission and of only three other classes of cases,

viz., suits for the enforcement of orders of the Commission, other than orders for the payment of money, suits to prevent unjust discrimination and rebating under the Act of February 19, 1903 (32 Stat. 847 (49 U. S. C. A. sub-Sec. 41-43)), and applications for writs of mandamus to require carriers to comply with the provisions of the act. It will be noted that all three of these classes embrace only cases which are prosecuted for the benefit of the public at large and to which the public, through the representation of the Attorney General or the Commission, is a party. And we think it is a reasonable inference from the fact that suits to enjoin or set aside orders of the Commission were included with these, that such suits were understood to include only those which were brought to enjoin or set aside orders made by the Commission in its quasi legislative capacity and which affected the public at large.

* * * * * * *

"The power of this court to grant injunctions in cases of this kind is no greater than that of the Commerce Court; for we exercise jurisdiction in such cases only by virtue of the provision of the Urgent Deficiencies Act of October 22, 1913, 38 Stat. c. 32, which abolished the Commerce Court and transferred to the District Courts its jurisdiction."

This case was affirmed by the United States Supreme Court, per curiam, sub nom Brady v. United States, 283 U. S. 804.

We are not impressed by the attempt of the plaintiffs to distinguish these cases and to minimize their authority, To us they seem controlling.

Nor can we find any merit in the contention of plaintiffs that this is not a suit to set aside an order of the Commission denying reparation. In their brief we find:

"There is no prayer before this Court that it determine either (a) whether we are entitled to reparation, or (b) 'the amount thereof.' This Court is simply asked to determine whether the Commission acted arbitrarily or beyond its statutory power in deciding *upon*

the same mass of evidence that rates were *not* unreasonable prior to a certain date, but that they *are* unreasonable subsequent to such date and whether the decision of the Commission contains the essential findings of preliminary fact to sustain these divergent views. As a necessary corollary this suit raises the further question whether the Commission has wrongfully assumed a power of discretion in respect of determining past unreasonableness. If this Court finds with us, it is asked to remand the case for further action within the frame work of power properly exercised."

If to this contention any answer be necessary beyond its mere statement, that answer, we think, is found in the words of Circuit Judge Swan, in George Allison & Co. v. United States, 12 F. Supp. 862, 863-864:

"Plaintiffs, on the other hand, insist that they seek no reparation or damages, but merely ask annulment of part of an affirmative order arbitrarily fixing as reasonable the rates and charges attacked. The petition is framed so as to be consistent with this contention; as has been stated, plaintiffs request the annulment of the parts of the order of November 7, 1933, already indicated, and there is no prayer for damages or reparation. But it is too plain for argument that this suit was prompted by the hope that its success would pave the way for a later recovery of damages against the carrier in a larger amount than the order of November 7 permits. The plaintiffs, as complainants or interveners in the proceedings before the Commission, sought reparation as well as reasonable rates for the future. * * * Hence, in substance there is presented a situation wherein shippers sought reparation for excess charges exacted by a carrier, and now complain that the Commission fixed reasonable rates for the past too high and failed to award them the full measure of damages they were entitled to. If this court has no jurisdiction to entertain such complaint, it cannot be conferred by the devious method of assailing in one step the preliminary finding upon which the damages

> awarded must be computed, and postponing to a later proceeding the actual prayer for additional reparation. Compare Standard Oil Co. (Indiana) v. United States, 283 U. S. 235, 241, 51 S. Ct. 429, 75 L. Ed. 999. The real inquiry is whether such jurisdiction exists."

This case was affirmed, on the strength of the Standard Oil case and the Brady case, 296 U. S. 546.

We must therefore conclude that the instant case is not within the jurisdiction of our specially organized three-judge District Court. For that reason, the complaint of the plaintiffs must be dismissed.

(2) Merits.

Even if we concede that this Court has jurisdiction to set aside that part of the Commission's order which denied reparations, as to the past, for the plaintiffs, we still think that *on the merits,* the complaint must be dismissed.

Said Mr. Justice Cardozo, in Mississippi Valley Barge Co. v. United States, 292 U. S. 282, 286:

> "The settled rule is that the findings of the Commission may not be assailed upon appeal in the absence of the evidence upon which they were made. * * * The findings in the report being thus accepted as true, there is left only the inquiry whether they give support to the conclusion. * * * The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

The scope of our review is thus very narrow. And we think that the findings of the Commission (though not as clear and as complete as the importance of the instant case would justify) do afford ample support and a rational basis for the Commission's decision, which denied reparations to the plaintiff.

There is nothing essentially inconsistent between the two conclusions of the Commission as to freight rates in the Western part of the district: (1) That these rates were unreasonable for the *future;* (2) that these same rates were not unreasonable as to the *past.*

In Baer v. Denver & Rio Grande Railroad Co., 233 U. S. 479, 486, Mr. Justice Lamar aptly said:

> "* * * awarding reparation for the past and fixing rates for the future involve the determination of matters ess-tially different. One is in its nature private and the other public. One is made by the Commission in its *quasi*-judicial capacity to measure past injuries sustained by a private shipper; the other, in its *quasi*-legislative capacity, to prevent future injury to the public."

The clear line of demarcation between these two functions of the Commission has been recognized in many cases by the federal courts. See, for example, Great Northern Railway Co. v. Merchants Elevator Co., 259 U. S. 285, 291; Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co., 283 U. S. 370, 388; Morgan Co. v. Great Northern Railway Co., 285 Fed. 876, 877; George Allison & Co. v. Interstate Commerce Commission, 107 F. (2d) 180, 186, cert. den. 309 U. S. 656. A few representative cases, in which the Commission reached a like conclusion, may be cited. Anadarko Cotton Oil Co. v. Atchison, etc. Ry. Co., 20 I. C. C. 43, 50; Eastern Livestock Cases of 1926, 144 I. C. C. 731, 781; John Nix & Co. v. Railway Express Agency, 238 I. C. C. 60, 61.

We next discuss whether the Commission's order denying reparations is supported by the findings of the Commission. We think it is. The process of rate-making cannot be solved by the rigid application of algebraic formulae or reduced to the monotonous regularities of mechanical instrumentalities. As Mr. Justice Lamar remarked in Interstate Commerce Commission v. Union Pacific Railroad Co., 222 U. S. 541, 550:

> "There is no possibility of solving the question as though it were a mathematical problem to which there could only be one answer."

And, in Board of Trade v. United States, 314 U. S. 534, 546, Mr. Justice Frankfurter said:

> "The process of rate making is essentially empiric. The stuff of the process is fluid and changing—*the re-*

sultant of factors that must be valued as well as weighed." (Italics ours.)

Among the important findings, on which the denial of reparations was grounded by the Commission, some may be pointed out and briefly discussed.

The Commission found: "The assailed rate of $2.65 to the destination group as a whole compares favorably with rates from both the southern and northern fields to many destinations throughout the East and to the Carolinas." Certainly that is an important factor to be both valued and weighed. The case of the plaintiffs here was grounded very heavily on the basis of cost. The Commission indicated very clearly that this element in rate making had been duly appraised and was "entitled to considerable weight" though not in itself alone conclusive. Incidental reference was made to the possible effect of the instant rate on other rates for carriers of coal.

Stress was laid by the Commission on its past experience with freight rates on coal in this area. These rates had been duly considered by the Commission is a number of proceedings. Surely the Commission was amply justified both in considering the wide background of this experience and information thus gained and in making it a cardinal ground for its ultimate decision on the question of reparations.

Very dynamic and exceedingly influential was the Commission's finding that the instant rates had become unreasonable "as the result of *changes so gradual* that *no date can be pointed out upon which they became unreasonable.*" (Italics ours.) It would have been extremely helpful had the Commission been more specific as to the nature, the approximate dates and even the probable force, of these changes. Yet, standing alone and quite apart from any omissional imperfections, we must give it due consideration and proper heed.

We do not attribute very compelling force to the fact that "the history of the rates is such as to justify the carriers in believing that they were maintaining rates which had our (the Commission's) approval." Whatever probative force this fact may have on the question of wilfullness on the part of a carrier, it could hardly be a basis for sustaining (as to

the past) a freight rate in the face of convincing proof that this rate was unreasonably high. This does not, of course, mean that evidence justifying such belief would not have some force as tending to prove the reasonableness of the assailed rate. See the vigorous language of District Judge Paul in City of Danville v. Chesapeake & Ohio Ry. Co., 34 F. Supp. 623, 628-629.

As to the standards applied by the courts in passing on the sufficiency of the Commission's findings, Mr. Justice Brandeis, in United States v. Baltimore & Ohio Rr. Co. 293 U. S. 454, 464-465, said:

> "In Florida v. United States, 282 U. S. 194, the legal distinction was pointed out between what may be termed quasi-jurisdictional findings, there held to be indispensable, and the 'complete statement of the grounds of the Commission's determination' which was declared in Beaumont, S. L. & W. Ry. Co. v. United States, 282 U. S. 74, 86, to be desirable for a proper consideration of the case in the courts. The lack of such a complete statement, while always regrettable, because unnecessarily increasing the labor of the reviewing court, compare Virginian Ry. v. United States, 272 U. S. 658, 675, is not fatal to the validity of the order. It is true that *formal and precise findings are not required,* under Sec. 14 (1) of the Interstate Commerce Act, which declares that the report 'shall state the conclusions of the Commission together with its decision.' Compare Manufacturers Ry. Co. v. United States, 246 U. S. 457, 487; Meeker & Co. v. Lehigh Valley R. Co., 236 U. S. 412, 428. That provision relieves the Commission from making comprehensive findings of fact similar to those required by Equity Rule 70½. But Sec. 14 (1) does not remove the necessity of making, where orders are subject to judicial review, quasi-jurisdictional findings essential to their constitutional or statutory validity." (Italics ours.)

And see Meeker v. Lehigh Valley R. Co., 236 U. S. 412, 427-428; Manufacturers' Ry. Co. v. United States, 246 U. S. 457,

487; and United States v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co., 294 U. S. 499, 504-505, 510-511.

Counsel for plaintiffs maintain seriously and strenuously that the Commission has "substituted a supposed 'rule of damage' for its lementary duty to pass upon the reasonableness *per se* of freight rates" and has "imported into this proceeding * * * a restatement in different form of the 'extortion' theory * * * repeatedly rejected by Congress." In the light of what has been previously said in this opinion, we think this contention is lacking in substantial merit.

In Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 591, 602, said Mr. Justice Douglas:

> "The Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the act carries a heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences."

This statement was further approved in Interstate Commerce Commission v. Jersey City, 322 U. S. 502, 512-513.

We do not think the plaintiffs here have carried the heavy burden, thus imposed on them, by making a convincing showing that the order of the Commission denying reparations is invalid.

An order will be drawn dismissing the complaint of the plaintiffs.

Complaint dismissed.

I concur:

(Sgd.) ROBT. N. POLLARD,
United States District Judge.

I concur in this opinion—

(Sgd.) STERLING HUTCHESON,
U. S. District Judge.

Jany. 25, 1945.

APPENDIX "B"

Judgment of the Court

(Entered and filed February 14, 1945)

Civil Action No. 337

ASHLAND COAL AND ICE COMPANY, INC., ET AL., *Plaintiffs,*

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET ALS., *Defendants*

This action having come on for hearing on the 29th day of December, 1944, before a statutory Court composed of three judges, upon the pleadings filed herein, the arguments of counsel and briefs submitted herein, and the Court having maturely considered the same, and having filed its opinion herein on February 5th, 1945, it is

Ordered, adjudged and decreed that the above-styled action be, and the same is hereby, dismissed.

(Sgd.) ARMISTEAD M. DOBIE,
United States Circuit Judge;
(Sgd.) ROBT. N. POLLARD,
United States District Judge;
(Sgd.) STERLING HUTCHESON,
United States District Judge.

February 14, 1945.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1287

ASHLAND COAL AND ICE COMPANY, ET AL.

v.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION.

REPLY OF APPELLANTS TO MOTION OF APPELLEES TO AFFIRM JUDGMENT.

WALTER M. EVANS,
HARRY C. AMES,
Attorneys for Appellants.

Of Counsel:

EVANS AND ROOKE,
State-Planters Bank Building,
Richmond 19, Virginia.

AMES, HILL AND AMES,
238-241 Transportation Building,
Washington 6, D. C.

May, 1945.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No.

ASHLAND COAL AND ICE COMPANY, ET AL.

v.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION.

REPLY TO MOTION TO AFFIRM.

PRELIMINARY STATEMENT.

The motion to affirm contains a complete summary of the proceedings before the Interstate Commerce Commission and the lower Court and for brevity it will not be repeated here.

The Court below and the government in its motion to affirm rely upon two propositions, viz.: (a) the matter of jurisdiction to review an order of the Interstate Commerce Commission, such as that involved herein, and (b) the merits.

ARGUMENT.

1. On the question of jurisdiction the motion to affirm adopts as its own and supports what we believe to be the erroneous theory of the Court below, viz., that there is something inherent in the so-called "scheme of reparations" which gives added power to the Commission and a degree of finality to its orders beyond that applying with respect to other types of orders, and that this is a case where the provisions of section 9 of the interstate commerce act involving an election of remedies come into play.

Neither of these theories reflects a proper concept of the nature of this suit. We do not challenge the original and exclusive jurisdiction of the Commission to determine the question of reasonableness either for the past or for the future. That question is settled by *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S., 426 (1907). We do not challenge the power of the Commission to find, on *substantial evidence*, that a rate may be reasonable in the past but unreasonable for the future, or *vice versa*. That question is settled by *Baer Bros. Mercantile Co.* v. *Denver & R. G. R. Co.*, 233 U. S. 479 (1914). Nor did we ask of the lower Court any order either awarding reparation as an original proposition or to effect any change in an order of reparation by the Commission (Compare *Baltimore & O. R. Co.* v. *Brady*, 288 U. S. 448 (1933).

What we did contend was that the Commission, acting under a single standard of reasonableness and upon a single mass of evidence, has reached diametrically opposed conclusions on the question of past and future reasonableness, without making the necessary preliminary findings of fact to support them. Since these defects and omissions are apparent on the face of the Commission's decision the situation comes within the rule of *Florida* v. *United States*, 282 U. S. 194 (1931),[1] to the effect that a finding merely "in the

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[1] Followed in *United States* v. *Baltimore & O. R. Co.*, 293 U. S. 454; *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499; *City of Yonkers* v. *United States*, 320 U. S. 685.

language of the statute" is not enough. We sought in the lower Court a finding to that effect and an order remanding the case to the Commission for action within the framework of the statute.

While it is true that a decision of the Commission, *on substantial evidence,* that an assailed rate is not unreasonable, *both* as to the past and for the future would be conclusive upon the Courts, there is an obvious distinction between a finding of that character and findings as those here involved. It is our contention that opposing conclusions reached on the same evidence and under a single standard set by statute should be spelled out "with the simplicity and clearness through which a halting impression ripens into reasonable certitude" and that "something more precise is requisite" in support of such opposing conclusions than the mere lifting of a supposed principle from another case bottomed upon a factual foundation having nothing in common with the case at bar (Compare *United States* v. *Chicago, M. S. P. & P. R. Co., supra*). This is particularly true when it is considered, as the report of the Commission shows, that the affirmative evidence on the question of reasonableness was based upon a study of the cost of performing the service and that the "study period" covered the years 1935 to 1939 (later revised so as to take in 1940). The effect of the Commission's decision is that 1935 to 1940 cost data spelled out a case of *future* unreasonableness (1944 and later) but that the rates were reasonable during the study period for which the data spoke. Following out the permissive range of discretion announced in the *Baer Case, supra,* a conclusion exactly the opposite of that reached would have been far more realistic.

There is nothing in law or logic to support the theory that arbitrariness may find a safe refuge behind the so-called "scheme of reparations" any more than it could do so with respect to any other function of the Commission. It is true that the Courts have held that a finding of *past* unreason-

ableness is a quasi-*judicial* function[2] whereas a finding for the future is quasi-*legislative*. But the difference does not rest upon any difference in the *standards* of reasonableness or upon any difference in the duty of the Commission in the exercise of the art of rate making. It rests solely upon the proposition that a finding as to past unreasonableness necessarily involves an award of monetary damage. This was made perfectly clear by this Court in *Mitchell Coal & Coke Co.* v. *P. R. R. Co.*, 230 U. S. 247 (1913) when it expressly limited the "right of contestation" as to reparation orders to matters bearing directly upon the question of damage.

The only semblance of color to a contention that findings of past reasonableness and dismissals of complaints involving reparation have ever stood upon a special plane in the matter of judicial review is the fact that for years such orders were regarded as "negative orders" immune from review under the doctrine announced in *Proctor & Gamble* v. *United States*, 225 U. S. 282 (1912) and the fact that that doctrine was not rejected as a proper "touchstone of jurisdiction" until *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, decided in 1939, perhaps explains why similar orders of the Commission have not been judicially challenged heretofore and why this is a case of first impression.

The holding of the lower Court and the argument of the government that this is a case where we are estopped from seeking judicial review by an election of remedies is equally unsound. As a practical matter where a question of reasonableness is concerned there is no real election of remedies.[3] That was made clear in the *Abilene Case, supra.*

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[2]Because under the rule of *Southern P. Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, such a finding carries with it an award of damage, as of course, in the precise amount of the unreasonableness found.

[3]The only occasion for touching upon the matter of "election of remedies" in *Baltimore & O. R. Co.* v. *Brady, supra*, was because the shipper in that case sought to change the *amount* of a Commission award on the theory that the Commission had erroneously applied the "mitigation of damage" rule.

While it might be possible to lodge a complaint with the Commission praying that it limit its decision as to the past to the bare question of reasonableness, leaving to the shipper the right to pursue his claim for damage through the Courts, there would be no point in taking such a step in view of the damage *per se* rule of the *Darnell-Taenzer Case, supra,* and we know of no case where such procedure has been followed.

The only situation in which there is a real election in the matter of remedy where an administrative function of the Commission is concerned[4] is where there is a contention that the carrier has charged the shipper in an amount different from and higher than the charge provided in its published tariffs, commonly referred to as "overcharge" claims. As to them there is a true right of election since this Court has held that a question of tariff construction, unlike a question of "reasonableness", can be decided initially by a Court of competent jurisdiction. *Great Northern R. Co.* v. *Merchants Elevator Co.,* 259 U. S. 285 (1922). Such a case was *Standard Oil Co.* v. *United States,* 283 U. S. 235, referred to at pp. 8 and 9 of the Motion to Affirm. In that case the shipper contended before the Commission that it had been subjected to charges higher than those legally applicable under the published tariffs. Having thus elected in which forum—the Commission or the Courts —it should pursue its remedy it was very properly precluded from attempting a second presentation in the Courts.

A similar situation was presented in *Atlantic Lumber Co.* v. *Southern Pac. Co.,* 47 Fed. Supp. 511, 514. There, as in the *Standard Oil Case* just cited the sole question presented to and decided by the Commission was whether the shipper had been subjected to charges over and above the published

[4]We speak here, of course, of matters concerning the charging and collecting of freight rates.

tariff rates. While certain statements lifted from context[5] may appear to lend support to the sanctity theory as to reparation orders, we submit that the value of the case as a precedent must be measured by the fact situation considered. It should be borne in mind, too, that more than the simple denial of reparation is involved here. The basic question here is whether there is arbitrariness in reaching opposing conclusions on the same evidence without the essential preliminary findings to support such opposing views.

While the decision in *George Allison & Co.* v. *United States*, 12 F. Supp. 862 (affirmed per curiam in 296 U. S. 546) did not turn on the matter of "overcharge", we submit that there are two reasons why it is without any value as a precedent here. Development of these reasons will require a brief resume of the proceedings before the Commission in that case.

The case before the Commission was an attack upon the "express" rates on strawberries and the complaint prayed for reparation on past shipments and reduced rates for the future. Two decisions were rendered by the Commission. The first (190 I. C. C. 520) by Division 5, found the rates[6] unreasonable to the extent they exceeded 120 per cent of the contemporaneous first-class railroad freight rates, and awarded reparation on past shipments down to that basis. The reduced rates thus prescribed became effective on March 3, 1933. Eight months later, or on November 7, 1933, the entire Commission, in a report on reargument, ordered the rates for the future reduced still further, or to 105 per cent of the railroad first-class freight rates and

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[5]Such as that at p. 513, reading: "The power to give reparations in rate cases is of statutory genesis and was unknown at common law. It is a discretionary authority reposed in the Commission in order to round out the scheme of regulation. Congress endowed with administrative finality such orders of the Commission."

[6]Refrigeration charges were also involved but for simplicity we confine ourselves to rates.

the new basis was ordered to become effective on December 28, 1933. For the past, however, the Commission awarded reparation only to the higher level (120%) previously prescribed by Division 5, *and which had been in effect since March 3, 1933.* Its order was attacked, so far as the past was concerned, because the Commission had "acted without any evidence to support the distinction, since the hearings had been closed in October, 1931, and no evidence was or could have been offered to establish a difference in conditions between services rendered before December 28, 1933, and those to be rendered thereafter."

The first point we make is that in the factual framework of that case the Court was bound to dismiss the suit because of the rule which this Court had announced in 1932 in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry.*, 284 U. S. 370, to the effect that if the carriers are applying a rate prescribed by the Commission in its quasi-legislative capacity and hence are acting under compulsion of a Commission order, the Commission cannot later in its quasi-judicial capacity compel a retroactive reduction of that rate.

But our second and most important point is that the report of the lower Court plainly discloses that it grounded its dismissal primarily on the "negative order" doctrine, since that doctrine had not then been rejected.[7] For example, after pointing out (p. 863) that "The defendants do not attempt to support on the merits the fixing of higher rates for past services than for future services" the Court remarked (p. 863) that "they urged that the parts of the order under attack may not be reviewed because they are negative in character and concern reparation." At p. 864 of its decision the Court squarely relied upon the *Procter & Gamble Case* and when it stated (p. 864) that—

> There can be no substantial difference between review of an order denying a shipper reparation, and review of an order granting some damages but denying the full reparation sought,

[7]The decision in the *Rochester Telephone Case* came later, in 1939.

it referred to this Court's decision in *Hooker* v. *Knapp*, 225 U. S. 302, decided contemporaneously with the *Procter & Gamble Case* and upon the authority of the latter. Additionally, the *Allison Case* did not present the basic question here involved because here, on the very evidence upon which rates were reduced for the future the Commission, "in the language of the statute" has found them not unreasonable during the period for which the evidence spoke.

2. In discussing the merits movants state at p. 10:

> In determining the validity of the Commission's action under such circumstances the judicial inquiry is exhausted when it is determined that there is a rational basis and substantial evidence to support the conclusion approved by the Commission.

We have no quarrel with that statement as an abstract proposition, nor do we deny that the Commission had "substantial evidence" (our own evidence) to show that the assailed rates were unreasonable. But what could be "rational" about a decision which concludes that cost evidence adduced over the period from 1935 to 1940 spells out unreasonableness from and after 1944 but not during the cost study period?

In the *Milwaukee Case, supra*,[8] this Court was considering an order of the Commission in which it had exerted its administrative discretion to direct the cancellation of rates which the rail carrier had filed pursuant to its right to initiate rates. The reports of the Commission[9] contained some 19 pages of discussion and reasoning but fell short of saying with particularity in just what respect the carrier-made rates were in violation of the law. Speaking of such generalities this Court, speaking through Mr. Justice Cardozo, stated at pp. 510, 511:

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[8] *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499.

[9] 197 I. C. C. 245; 200 I. C. C. 609.

We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. One gains at places the impression that the Commission looked upon the proposed reduction as something more than a disruptive tendency; that it found unfairness in the old relation of parity between Brazil and Springfield; and that the new schedule in its judgment would confirm Milwaukee in the enjoyment of an undue proportion of the traffic. The difficulty is that *it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude.* In the end we are left to spell out, to argue, to choose between conflicting inferences. *Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency.* Beaumont, *S. L. & W. R. Co.* v. *United States*, 282 U. S. 74, 86, 75 L. Ed. 221, 229, 51 S. Ct. 1; *Florida* v. *United States*, 282 U. S. 194, 215, 75 L. Ed. 291, 304, 51 S. Ct. 119. We must know what a decision means before the duty becomes ours to say whether it is right or wrong. (Emphasis supplied).

Any fair appraisal of the language used by the Commission in this case under the general heading "Reparation"[10] will show that it is subject to similar criticism. The observation, for example, that the assailed rate of $2.65 had its root in a rate of $1.50 effective in 1915, can have nothing but historical value and very little of that in connection with a rate in effect 20 years or more later. Further, the Court will note that in the interval the rate had been increased by $1.15 per ton or 76 per cent. Similarly valueless are the statements as to rates to other territories since our case was presented solely upon the basis of the cost of service as the report of the Commission shows.

It is plain from the face of the Commission's decision that it relied primarily upon the statement of principle lifted bodily from a case decided in 1926 on a state of facts

[10]And found in 256 I. C. C. 429, at pp. 451, 452.

entirely foreign to those involved in this case. This statement of principle reads:

> When we are of the opinion that rates have become unreasonable as the result of changes in conditions so gradual that no date can be pointed out upon which they became unreasonable, and the history of the rates is such as to justify the carriers in believing that they were maintaining rates which had our approval, we have the power to fix the reasonable rates for the future, and, in that "flexible limit of judgment which belongs to the power to fix rates" to refuse to hold the rates unreasonable in the past.

We submit first of all that the statute confers no power upon the Commission "to refuse to hold rates unreasonable in the past" under any circumstances. On the contrary, the statute simply declares that rates must be "just and reasonable", and prohibits and declares unlawful all "unreasonable rates" with no distinction as between the past and present or future. Further, the statute contains complete machinery for the recovery of damages for violations of the act and damages bespeak past offenses, so far as rates are concerned.

We submit further that when the Commission abandons the ordinary tests for determining reasonableness in favor of what the carriers were "justified in believing" about their rates, or upon the fact that "no date can be pointed out upon which (the rates) became unreasonable" it is substituting for something concrete or tangible something which is so vague and conjectural as to amount to no standard at all.

The acceptance in this case of what the carriers were "justified in believing" about their rates as a ground for denying reparation is in sharp contrast with the refusal of the Commission to accept it as a defense in connection with earlier cases[11] involving the same carriers, the same

[1] *State Corp. Comm. of Virginia* v. *Norfolk & W. Ry. Co.*, 190 I. C. C. 325; and *Staunton Brick Co.* v. *Chesapeake & O. Ry. Co.*, 190 I. C. C. 302.

commodity, and the same rate structure with respect to destinations, Lynchburg, Va., and west. In those cases the carriers refused to honor the Commission's reparation awards and it became necessary to sue upon them.[12] Again, in the Court the railroads raised the point that they were "justified in believing" that the rates they charged were reasonable rates. Speaking of the defense in the *Danville Case*,[13] the Court said at pp. 628, 629:

> The defense which is most earnestly urged and raises the most difficult question is the fifth, which asserts, in effect, that the assailed rates and similar had received the previous approval of the Commission; that they had been long maintained without complaint by shippers and compared favorably with other rates in the same general territory; that this prior approval, favorable comparison with other rates, and long maintenance without complaint were proper guides to the defendants in determining the reasonableness of their rates and upon which they had a right to rely to the extent of not thereafter being held for reparation. And that for these reasons the Commission was without authority to hold the rates unreasonable in the past and order reparation.
>
> The defendants based their contention here upon the case of *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 52 S. Ct. 183, 76 L. Ed. 348, and upon what they assert is the proper interpretation and effect of that case. While argument in briefs and orally has taken a wider range, it comes in the end to a question of the authority of the Commission to award reparation growing out of a rate which, so the carriers contend, had received the prior approval of the Commission and which had been long maintained in reliance upon that approval.

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[12]The decisions by Judge Paul are in *City of Danville* v. *Chesapeake & O. Ry. Co.*, 34 Fed. Supp. 623; *City of Harrisonburg* v. *Chesapeake & O. Ry. Co.*, 34 Fed. Supp. 641; and *American Furniture Co.* v. *Norfolk & W. Ry. Co.*, 34 Fed. Supp. 647 (all in 1940).

[13]The Court below in this case accepts Judge Paul's view in principle.

> It may be said in passing that the fact that a rate has been in effect and that a large volume of traffic has moved under it without complaint *is not conclusive that the rate is not unreasonable.* It is true that where a rate is in effect and no one from whom the rate charged is exacted complains of it, the very absence of any complaint would indicate that the shipper was satisfied that he was not being unreasonably charged. And the longer this condition continued the stronger would be the evidence that the rate was not unreasonable. *But if the payment by shippers, for any substantial period, of a rate fixed by a carrier were to preclude inquiry into its reasonableness we would have an effective barrier to changes in rates and to reparation,* for the latter at least is based only on what the shipper has previously paid out under the rate. The claim for reparation would be defeated by the very fact that the payments made by him and for which he claimed reparation were proof that the rate was reasonable. That the Commission in determining the reasonableness of a rate *may* consider the period over which it has been maintained, the unconmplaining acquiescence of shippers in it, its similarity to other rates, I have no doubt. And I have no doubt that the Commission does so. But this determination, upon whatever proper evidence or considerations based, is a matter for the Commission. And the Court would not be justified in interfering with it, in the absence of other considerations or conditions affecting the Commission's authority.

and in the *American Furniture Case,* at pp. 650, 651, the Court reiterated:

> The grounds of defense in Nos. 4, 5 and 6 are based on the theory that since the rates assailed had been long in effect and had conformed, *as the carriers believed,* to standards set up by the Commission, the Commission was estopped now to hold them unreasonable and particularly to grant reparation thereon. To this is added the contention that the Commission had, at a previous time, held that certain of the rates were not unreasonable. All of the questions raised by these defenses have been discussed at length in the opinion

> recently filed by this Court in case of *City of Danville* v. *Chesapeake & Ohio Ry.* (*Danville Hotel Co.* v. *Chesapeake & Ohio Ry.*), previously referred to. Everything said in those cases is applicable here and disposes of the contentions here made. Nor has any question been raised in the instant case that requires explanation or extension of what was there said. For that reason, the applicable portion of that opinion (34 F. Supp. 628) is here adopted without repetition in words. (Emphasis supplied).

Only a queer process of administrative reasoning could embrace and reject the same defense with respect to the same rate structure.

And no greater strength is assignable by way of defense to the statement by the Commission that the rates became unreasonable "as the result of changes so gradual that no date can be pointed out upon which they became unreasonable." Rate making has never reached that degree of mathematical precision upon which such a "date" could be fixed. Rates become unreasonable when the administrative agency charged with the duty of declaring them so has acted upon a mass of evidence concerning the question. In this case that evidence took the form of "cost" evidence and the study period embraced the years 1935 to 1940. In other words, in this case it should have been much easier to "spot" the date of unreasonableness than is ordinarily true when a case is made out upon rate comparisons with other rates. And no great difficulty in approximating the cost of handling an individual commodity—coal—presented itself here because 90 per cent or more of the traffic of these Pocahontas carriers consists of coal.

In recalling that the period during which a "gradual change of conditions" might arise in this case was from 1935, when the statute of limitations began to run as to our complaint filed in 1937, and 1943, when the case was finally decided, it is interesting to recall a statement made by the Commission as to the financial condition of these Poca-

hontas lines in 1937, the very year in which we filed our complaint, and one of the years included in the study period. In that year the Class-I carriers of the entire country had petitioned the Commission for general increases in their rates. When it came to the commodity—coal—it was immediately apparent that increases could not be granted to the northern lines, such as the Pennsylvania and withheld from the Pocahontas lines, without increasing the competitive advantages of the latter in areas served by both.[14] Faced with this dilemma the Commission was compelled to bestow unneeded increases on the Pocahontas lines. But in doing so it said:[15]

> The situation of the Pocahontas lines with respect to these bituminous-coal rates is an extreme case. The sole justification for increasing their rates on this traffic lies in the needs of other railroads, and it *shocks the conscience* that in accomplishing this purpose their revenues should be swollen by more than $6,000,000 which they do not need and which will not be used for any betterment of the general railroad situation. (Emphasis ours).

That was one of the most pronounced "changes of conditions" under which the Pocahontas carriers labored during the reparation period.

There is no question that denial of reparation in the circumstances of this case amounts to an assumption by the Commission of a discretionary power to grant or deny reparation, not upon the ordinary standards of unreasonableness, but as it sees fit.[16] It harks back to a similar attitude assumed by the Commission in the case of *Sloss-Sheffield Steel & Iron Co.* v. *L. & N. R. Co.*, 30 I. C. C. 597, decided in

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[14]In the destination territory here involved the Pocahontas lines enjoy a complete monopoly of transportation.

[15]*General Commodity Rate Increases*, 1937, 223 I. C. C. 657, 745.

[16]This is made clear by its different approaches to the question west and east of Lynchburg.

1914. In that case the attack was on the rates on pig iron out of Birmingham, Ala., and the complaint contained a prayer for lower rates for the future and for reparation on past shipments. The Commission reduced the rates for the future but when it came to the question of reparation it summarily dismissed the complaint with these words:

> Reparation is prayed for, but under the circumstances of this case *we do not believe that it may fairly be awarded.* (Emphasis supplied).

That action, of course, amounted to a forthright assumption by the Commission unadorned by any language of generality of a complete discretion in the matter. The case had a very interesting subsequent history. Petitions were filed, the case was reopened and three additional reports were rendered.[17] Finally, in a fourth supplemental report[18] the Commission retreated from its original position and announced:

> We think that under all the circumstances complainants *are entitled to a finding* as to the reasonableness of the rates during the two years prior to the filing of the complaint. (Emphasis supplied).

At the same time it announced that upon petition of any party within 30 days it would reopen the proceeding for further proof on the point. If no such further petition was received *it would decide the question on the record made.* No request for such hearing was made and in a fifth supplemental report[19] reparation was granted for the full statutory period *and on the original record.* This Court sustained the grant in full in *Louisville & N. R. Co.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217.

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[17] 35 I. C. C. 460; 40 I. C. C. 738; 46 I. C. C. 558.

[18] 51 I. C. C. 635.

[19] 52 I. C. C. 576.

We submit that the action taken by the Commission in this case is no less summary than that taken in the original decision in the *Sloss-Sheffield Case.* True, it has used more words, but mere words cannot take the place of essential findings. Certainly the language used lacks that "simplicity and clearness through which a halting impression ripens into reasonable certitude" (*Milwaukee Case*).

For many years the Commission has played with the idea that awards of reparation should be left to its discretion and that no reparation should be awarded except where a rate assailed was so high as to amount to "extortion".[20] It has repeatedly urged upon Congress an amendment to the act which would give it such power and Congress has consistently refused such requests.[21] In 1916 (two years after its summary denial of reparation in the *Sloss-Sheffield Case*) the Commission recommended to Congress that it change the law so as to require as the basis for an award of damage under section 1 the same proof of *special* damage as is required in discrimination cases under section 3. Congress refused to do so and then two years later (in 1918) came the decision in the *Darnell-Taenzer Case, supra.* In announcing the rule of damage *per se* in that case this Court, through Mr. Justice Holmes, was very careful to distinguish between the sort of damage arising out of unreasonableness and that arising from discrimination. It said:

> The cases like *Pennsylvania R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, where a party that has paid only the *reasonable* rate sues upon a *discrimination* be-

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[20]At the argument in the Court below counsel for the Commission advanced a new theory, viz.:

> It seems to me too that it is entirely reasonable for this court to regard the Commission's action in this case as in the nature of a conditional action, that is, the Commission conditioned its order reducing rates for the future upon its ability to deny reparation for the past.

[21]Annual reports for 1916 (pp. 75-78); 1919 (pp. 17-21); 1930 (pp. 90, 93).

cause some other has paid less, are not like the present. There the damage depends *upon remoter considerations,* but here the plaintiffs have paid cash out of pocket that should not have been required of them, *and there is no question as to the amount of the proximate loss.* (Emphasis ours).

Having failed in that effort to temper its duty to award reparation under section 1, the Commission then took up the so-called "extortion" theory. The latter theory is best enunciated in a concurring expression by Commissioner Hall in *Plymouth Coal Co.* v. *P. R. R. Co.,* 56 I. C. C. 699 (1920) in which the Commission was awarding reparation under section 1. Commissioner Hall's views so clearly take in the "extortion" theory and the "carriers' belief" theory that we quote them rather fully. He said first:

> The act to regulate commerce lays upon the carrier the duty of publishing and establishing just and reasonable rates. The rates so established may not be departed from by shipper or carrier. Later on, in passing upon those rates, we may deem it fitting to prescribe a lesser rate as reasonable maximum for the future, but our power to do so is conditioned on our being of opinion that the existing rate is unreasonable. If both rates are within the "flexible limits of judgment" which the Supreme Court recognizes when exercised by us, and which presumably exist when exercised by a carrier in initiating a rate, it seems harsh to hold, in effect, that because the carrier *was unable to forecast* the precise rate within those limits which would later meet our approval it must repay the difference to the shipper who has paid it. But if the carrier charged with the statutory duty of initiating just and reasonable rates goes clear outside the limits of judgment and publishes rates *which are unconscionable for the service rendered,* and which plainly could not be approved by the regulating tribunal, however constituted, it seems but just that when the carrier's default is later remedied by that body through determination of what in its judgment would have been a maximum reasonable rate, the rate so determined should replace for all

> purposes *that which was extorted from the public,* and that all who paid *the unconscionable rate,* and not merely those who have complained about it, should have their loss made good by an award of reparation. (Emphasis ours)

This is definitely an exposition of the "extortion" theory. After expounding it, the Commissioner continued:

> I can see no element of *extortion* in a rate established by a carrier in the fair exercise of its best judgment as to what will be just and reasonable, even though that judgment does not exactly coincide with the judgment later formed by the regulatory body, and in such cases no reparation should be awarded unless it be upon proof of actual damage to complainant traceable to that error in judgment as proximate cause.
>
> But when nothing that can fairly be called judgment has been exercised by the carrier, and the rate established by it and exacted from the public is *unconscionable,* such that the regulating tribunal can properly say, "*The carrier must have known that this rate was unjust and unreasonable,* or should have known if it did not in fact," then *extortion* has been practiced and the carrier should be made to restore every dollar exacted by it in excess of the maximum rate which we later fix. (Emphasis ours)

Then after expressing his *personal* views Commissioner Hall continued:

> From the record now before us I am not convinced that the complainant has in fact suffered injury or damage, as those terms are known to the law, but under the doctrine laid down by the Supreme Court in the *Darnell-Taezner Case, supra, I feel constrained to share in this award of reparation.* (Emphasis ours)

Somewhat similar views had been expressed by the Commission in its annual report to Congress in 1919. There, after quoting from the *Darnell-Taezner Case* it said:

> That damages in a pecuniary sense must be *proven* upon an allegation of unjust discrimination or undue prejudice * * * and that no such proof is required upon an allegation of unreasonableness under section 1 of the Act allows the *cause, character, and measure* of the wrong rather than *proof of injury* to determine whether damages should be awarded. That is to say damages are *presumed* by the payment of an unreasonable charge, and the measure of damage is a question of law instead of a question of fact.

It then went on to say:

> The distinction between the rule of damage of the *International Coal Case* in respect to discriminatory rates and the rule of damage in the *Darnell-Taenzer Case* in respect of unreasonable rates is apparently based upon what is said to be the common-law principle that an unreasonable charge is equivalent to an "extortion" or "overcharge." (Emphasis ours)

Of course, there is nothing in the decision of Mr. Justice Holmes in the *Darnell-Taenzer Case* which would support that interpretation of it.[22] Nothing the Court was called upon to decide necessitated such reasoning. The simple fact was that beginning in 1906 Congress had delegated to the Commission the complete power to fix rates. On the theory (a) that such power, being legislative in its operation on future rates, could not in any event be delegated to the courts, and (b) that the uniformity sought by the act could not be achieved unless a body "informed by experience" should have original and exclusive jurisdiction on the question of *both* past and future reasonableness (*Texas & P. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426) the Supreme Court simply held that where the Commission has declared a rate charged to have been unreasonable it follows as of course that the one who paid that rate has been damaged in the amount of the excess. There is not a word or an inference in the decision that common-law considera-

[22]Note that it was fully reaffirmed in the *Sloss-Sheffield Case, supra.*

tions entered into it, or that "extortion" in the common-law sense had been practiced.

But the Commission continued its criticism:

> But there appears to be no real analogy between an action to recover an *extortion* or *overcharge* and an action to recover an unreasonable charge under the Act to regulate commerce. The common-law action is more nearly analogous to an action to recover a charge over and above the published rate. At common law the overcharge was often in fact an *extortion.* But the exaction of a *published* charge which is legal under the statute, and which is afterwards found to be unreasonable, is in no proper sense an *extortion,* inasmuch as the law itself requires the payment of the published rate or charge. In publishing rates in the first instance *carriers have no way of knowing* that a regulating commission will subsequently find a particular rate to be unreasonable. (Emphasis ours)

Please note parenthetically how the idea of "extortion" or the carriers' "belief" about the rates permeated these observations. Please note, also, that these observations were all made by way of support *for a change in the law.* The *change,* however, has never been made by legislation.

After some additional comment upon the proposition that reparation in many cases never reaches the person damaged, the Commission made this specific recommendation:

> The law might well affirmatively recognize that private damages do not necessarily follow a violation of the act; and provide that sections 8, 9, and 16 of the act shall be construed to mean that no person is entitled to reparation except to the extent that he shows that he has suffered damage. The close analogy between a relatively unreasonable or unjust rate and an unjustly discriminatory or unduly prejudicial rate, and the difficulty of determining just when a rate becomes unreasonable or that it is unreasonable per se, *suggest that the law should provide that if a rate is found to be unreasonable the rule of damages laid down in the International Coal case should control.* (Emphasis ours)

Again, Congress refused to amend the act.

We cite these attempts by the Commission to have the rule of damage announced in the *Darnell-Taezner Case* changed[23] because we feel that the rule later announced in the *Eastern Livestock Case of 1926,* 144 I. C. C. 731, and resorted to here is merely another means of invoking the sort of theories which have been repeatedly rejected by Congress. The Commission has escaped judicial disapproval only because of the acceptance by the Bar of the "negative order" doctrine as a preventive of judicial review.

The only answer in the motion to affirm to our contention that it is utterly irrational to conclude from evidence addressed solely to the cost of service that rates were not unreasonable during the study period but became unreasonable several years later *and during a period of ascending costs* is found at p. 12, and reads:

> This contention fails to take account of the fact that the Commission in determining the reasonableness of a rate for the past and in awarding reparation performs a different function from that of determining the reasonableness of a rate for the future and prescribing a rate for the future.

As we have pointed out, the difference first noted by this Court in the *Bear Case,* as to the quasi-judicial quality of a

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[23]And, incidentally, the rule in that case that damage under section 1 should be the precise difference between the unreasonable rate charged and the rate found reasonable originatd with the Commission itself, when it sought to forestall claims for collateral damage. In *Perry* v. *Florida Central & Peninsular R. Co.,* 3 I. C. C. 740, 749 (1892), it said:

> The damages thus suggested are purely speculative and not susceptible of legal computation. They are as uncertain and remote as though claimed on the ground that if the transportation rate had been reasonable the complainant would have raised a larger crop * * *.
>
> The Commission sees no reason why it should * * * deviate from the rule that the measure of reparation due to injured parties for unreasonable rates is the difference between the rate actually charged and the reasonable rate which should have been chargd.

finding as to the past and the quasi-legislative quality of a finding for the future, does not rest at all upon any difference in the standard of reasonableness or in the art of rate making, but solely upon the fact that findings as to the past are necessarily tied to an award of monetary damage. If in the statutory command that rates must be "just and reasonable" and the declaration that unjust and unreasonable rates are "prohibited and declared unlawful" Congress intended that different *standards* should be applied as between the past and future it would have said so. As a matter of fact the words "just and reasonable" which have appeared unchanged in the act since its original passage, applied only to past rates for a period of 19 years, or from 1887 until 1906, because it was not until the latter year that the Commission was given power to prescribe rates for the future. *Cincinnati, New Orleans & T. P. Ry.* v. *Interstate Commerce Commission*, 162 U. S. 184.

In the concluding paragraph of the motion to affirm the government makes reference to the decision of this Court in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, 389. That decision stands as a bar against an award of reparation only in those situations where a carrier has charged a rate under compulsion of a Commission order. The rate here assailed has never been applied under such compulsion and in its denial of reparation the Commission did not rely upon that decision. It is rather odd that the government in defending this case should now make reference to that decision when, in precisely the same factual circumstances, it held in the cases involving rates west of Lynchburg which were part of the very rate structure here involved that the doctrine of the *Arizona Case* did not apply (See full discussion in *State Corp. Comm. of Virginia* v. *Norfolk & W. Ry. Co.*, 190 I. C. C. 325, at pp. 344, 345).

If the decision of the lower Court is allowed to stand in the circumstances of this case it will amount to judicial sanction for assumption by the Commission of the power to

grant or deny reparation not upon a determination as to whether the rates charged were or were not unreasonable based upon the single standard set by Congress but upon whether the carriers were "justified in believing" them to have been reasonable. The Commission in any given case will be free merely to quote from its decision in the *Eastern Livestock Case,* as it did here with or without some vague and general accompanying statements and the shipper will be without recourse.

Wherefore, we pray that the motion to affirm be denied.

Respectfully submitted,

WALTER M. EVANS,
HARRY C. AMES,
Attorneys for Appellants.

May, 1945.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1287

ASHLAND COAL AND ICE COMPANY, ET AL.,

v.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION.

SUPPLEMENTAL REPLY TO MOTION TO AFFIRM BY INTERVENING RAILROADS.

WALTER M. EVANS,
HARRY C. AMES,
Attorneys for Appellants.

Of Counsel:

EVANS AND ROOKE,
State-Planters Bank Building,
Richmond 19, Virginia.

AMES, HILL & AMES,
238-241 Transportation Building,
Washington 6, D. C.

May, 1945.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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SUPPLEMENTAL REPLY TO MOTION TO AFFIRM BY INTERVENING RAILROADS.

PRELIMINARY STATEMENT.

On May 1, 1945, we filed a reply to a motion to affirm on behalf of the United States and the Interstate Commerce Commission.

On April 21, 1945, we were served with an additional motion on behalf of "appellee railroads." This latter motion covers only two points to which additional reply seems necessary. They are:

(a) Reference to the statements made by the Commission in its final decision to wit:

> Since then in more than a dozen decisions we have prescribed rates from one or more of these

origin groups to a number of destinations to the north, south, and west of the present $2.65 group, which, in general, compare favorably, differences in distance and transportation conditions considered, with this assailed rate to the destination group as it has existed throughout the entire reparation period, and

(b) Reference to the fact that the Commission, in its decision, found rates to the eastern portion of the so-called $2.65 rate group not unreasonable for the future, thereby having the effect of splitting up the former group as it had existed in the past.

ARGUMENT.

1. Reliance upon "compared" or "prescribed" rates to the "north, south, and west" of the contested area affords no justification for the diametrically opposed conclusions reached upon the same mass of evidence and upon a single statutory standard. In other words if such reliance constitutes a valid defense with respect to the assailed rate the defense would have the same force for the future as for the past.

Moreover, this case was not presented to the Commission on any undertaking to prove unreasonableness from the standpoint of rate comparisons. In our original Brief to the Commission we made this plain in our opening statement where we said:

> A statement at the outset of the hypothesis of our complaint will be helpful to an orderly presentation and consideration of the case.
>
> The case here made, in support of our contention that the assailed rates are and have been unreasonable *per se*, is novel in the sense that it does not follow the usual plan of relying *as a primary proposition*, upon the standard of "rate comparison." On the contrary, we here tender to the Commission for the exercise of its administrative discretion, a case built *primarily* upon the cost of service, plus, or including, a fair measure of profit to the carriers performing the service.

And this fact was clearly recognized by the Commission as will appear from the following statement at pp. 430, 431, of its report:

> Complainants' case is principally based upon the premise that the cost of performing the service should be largely determinative of the reasonableness of the assailed rates. The cost study presented by complainants in the first hearing was defective in certain respects as pointed out in the prior report. At the further hearing, complainants presented additional cost evidence with a view to overcoming those defects.

And from the following statements at p. 451 of its report:

> The assailed rate of $2.65 to the destination group as a whole *compares favorably* with rates from both the southern and northern fields to many destinations throughout the East and to the Carolinas. Confined to the less-distant points in the group, however, most of such comparisons indicate that the assailed rate is relatively high. *Moreover, measured by cost alone, this rate is much too high,* especially to the western portion of the group. While we are not warranted in fixing rates solely on the basis of cost, nevertheless that element, *when supported by a cost study such as the one here before us, is entitled to considerable weight.* (Emphasis ours)

In other words, the Commission albeit the assailed rate "compare(d) favorable" with other rates concluded that "measured by cost alone" it "was much too high." If such a conclusion is sound as speaking from 1944 on or in an atmosphere of ascending costs, it must have been doubly sound during the cost study period which closed in 1940.

2. It is true that the final decision of the Commission had the effect of splitting or dividing the old $2.65 rate group which formerly had extended from a north and south line drawn just east of Lynchburg, Va., to tidewater. But what the appellee railroads fail to point out is that such action points inevitably to the conclusion that "measured by cost alone" the rates to the western or nearermost portion of

the group must have been even more unreasonable than they were as applied to the group as a whole.

Furthermore, our cost studies and the studies and analyses made by the Commission's cost-finding experts contemplated the group as a whole. In this connection it is interesting to note that to the group *as a whole* the Commission's cost experts found that our study, as revised by them, would produce a weighted average cost of $2.09 per ton as compared with the assailed rate of $2.65 per ton (256 I. C. C. 445). Included in the above "costs" were (a) operating expenses, (b) taxes (excluding Federal income taxes), (c) rents, (d) return on total investment (freight and passenger service), and (e) deficits from passenger and less-than-carload freight service.

If our study subjected to the careful scrutiny of the Commission's own analysts showed that such an all-inclusive "cost" *to the group as a whole* amounted to only $2.09 per ton, it is utterly unrealistic to argue that a finding limited only to the western half of the group would offer any justification for a conclusion of the Commission purporting to imply a valid "change of conditions" as between the future and the past.

Wherefore, for the reasons stated herein, and for those equally apropos in our reply to a similar motion on behalf of the government, we pray that the motion to affirm be denied.

Respectfully submitted,

WALTER M. EVANS,
HARRY C. AMES,
Attorneys for Appellants.

May, 1945.

MOTION OF UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION TO AFFIRM

(Filed April 12th, 1945)

(Title of Court and style of case omitted.)

Appellees United States and Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final judgment, dated February 14, 1945, of a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing plaintiffs' complaint to set aside an order of the Interstate Commerce Commission.

This suit was brought by various coal-dealers or coal-consumers located in Richmond, Ashland, Chester, Hopewell, and Petersburg, Virginia, to set aside a report (256 I. C. C. 429) and order of the Interstate Commerce Commission entered November 8, 1943, wherein the Commission, in a report on further hearing, concluded that, under Section 1 of Part I of the Interstate Commerce Act (49 U. S. C. 1), the rates of various common carriers by rail for the transportation of bituminous coal in carloads from points in West Virginia, Kentucky, and western Virginia, to certain destinations in eastern and central Virginia (including those in which plaintiffs are located) were unreasonable for the future to the extent that they

exceeded $2.45 per ton, but were not unreasonable for the past. The Commission in its order of November 8, 1943, directed the carriers to adopt $2.45 per ton rates for the future, but in view of its conclusion that the rates were not unreasonable in the past, did not award reparation for the past, which plaintiffs had sought in their complaints before the Commission. On January 14, 1944, plaintiffs filed a petition for reconsideration which was denied by the Commission on April 3, 1944. Plaintiffs sought to set aside the Commission's order only insofar as it related to the past and found the rates not then unreasonable.

The rail carriers whose rates are involved are the Chesapeake and Ohio Railway Company, the Norfolk and Western Railway Company, and the Virginian Railway, collectively referred to as the Pocahontas carriers, and also various connecting railroads including the Southern Railway Company, the Atlantic Coast Line Railroad Company, the Richmond, Fredericksburg and Potomac Railroad Company, and the Seaboard Air Line Railway.

The rates involved cover the transportation of coal from fields in several origin districts. The most easterly of these districts are the Pocahontas district on the lines of the N. & W., the New River district on the lines of the C. & O., and the New River-Pocahontas district on the lines of the Virginian. The rates are equal from any origin in these districts to any point in an extensive destination territory, except to points local to one or the other of the Pocahontas lines.

The destination territory extends from Blackstone on the N. & W., Whitlock on the C. & O., and Patrick Henry on the Virginian, east to the Atlantic coast, approximately 118 miles along the N. & W., 129 miles along the C. & O., and 168 miles along the Virginian. It includes not only points on the Pocahontas lines, but also points on connecting carriers. Richmond is approximately in the geographical center of this destination territory. (241 I. C. C. 120, 122.)

At the time the first complaints were filed before the Commission in February 1937, the rates were $2.65 per ton. On November 15, 1937, following *General Commodity Rate Increases, 1937*, 223 I. C. C. 657, the rate became $2.75 and on March 18, 1942, following *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, the rate became $2.80. Subsequent proceedings in the latter case resulted in the suspension of the increases and the rate became $2.75, effective May 1, 1943. For clarity, the Commission throughout its reports referred to the assailed rate as the $2.65 rate. From certain other coal-field districts, west of those mentioned above, to the same destination territory, the rate reflects a slight differential, and is generally ten cents higher than the $2.65 rate, except that from one district the rate is 30 cents higher (241 I. C. C. 120, 121).

Plaintiffs filed a complaint with the Commission on February 1, 1937, alleging that the above rates were, are, and for the future would be unreasonable in violation of Section 1 of Part I of the Interstate Commerce Act (49 U. S. C. 1). Reasonable rates

for the future and reparation, including reparation on shipments moving during the pendency of the proceedings, were sought. After answers by the carriers, a full hearing was had before one of the Commission's examiners and subsequently, after the filing of briefs, an examiner's proposed report was issued. Following exceptions thereto by the carriers and oral argument before Division 4, that Division on July 3, 1940, issued its report (241 I. C. C. 120), wherein the Commission dealt not only with this complaint but with other complaints, attacking, for the most part, rates to the same destination territory, which other complaints are not, however, involved in the present suit. Plaintiffs' case before the Commission was based primarily on cost of the service, rather than on rate comparisons. They introduced a cost study by means of which they sought to segregate the actual cost of transportating this coal, and endeavored to establish that the carriers from their existing rates on this traffic earned more than the cost of transporting it, including a fair margin of profit. The Commission found that plaintiffs' cost study, owing to many deficiencies, was not entitled to any controlling weight, and that the rates involved were not unreasonable by comparison with numerous other rates. It concluded that the assailed rates had not been shown to have been or to be unreasonable and dismissed the complaints.

Plaintiffs on September 20, 1940, filed a petition for reconsideration, and the Commission reopened the

proceedings for further hearing. At such further hearing, plaintiffs and the defendant carriers introduced additional evidence bearing upon the reasonableness of the rates. Plaintiffs, in particular, by additional cost evidence sought to overcome the defects in their cost study previously recognized by the Commission. After briefs had been filed, the trial examiner issued a second proposed report. Exceptions were again filed by the parties, the case was orally argued before the full Commission, and on November 8, 1943, it issued its report (256 I. C. C. 429) and order on further hearing here attacked.

With respect to the question of future unreasonableness the Commission in this report made the following subordinate findings (256 I. C. C. at p. 451):

> The assailed rate of $2.65 to the destination group as a whole compares favorably with rates from both the southern and northern fields to many destinations throughout the East and to the Carolinas. Confined to the less-distant points in the group, however, most of such comparisons indicate that the assailed rate is relatively high. Moreover, measured by cost alone, this rate is much too high, especially to the western portion of the group. While we are not warranted in fixing rates solely on the basis of cost, nevertheless that element, when supported by a cost study such as the one here before us, is entitled to considerable weight. As indicated in the prior report, this destination group extends from east to west for 168 miles on the Vir-

ginian, 118 miles on the N. & W., and 129 miles on the C. & O. Richmond is approximately in the geographical center of the group. There is no adequate reason for such an extensive destination group on this traffic and, considering the lengths of the hauls involved, we believe it to be unduly large. The record is persuasive that any material reduction in the track-delivery rates to Hampton Roads would carry with it a corresponding reduction, not only in the inside-the-capes [1] rates to Hampton Roads, but in like rates from the northern mines to Baltimore, which in turn would probably force reductions in other important rates on northern coal. Such collateral reductions would not result, however, from a reduction in the rates to the western portion of the destination group.

Considering the differences in the lengths of the hauls and in the operating conditions, the assailed rates to Lynchburg and River-

[1] The Commission's report indicates that the rates from the base groups on the Pocahontas lines to Norfolk and Hampton Roads on track-delivery coal, the rates here involved, had uniformly been 25 cents per ton less than the rates to the same points for transshipment by water to points in the Chesapeake Bay area lying inside the Chesapeake Capes (Cape Charles and Cape Henry). The same relationship had prevailed at Baltimore and Philadelphia between the track-delivery rates to those points and the rates to those points for transshipment by water to points within the Capes. The northern carriers feared that a reduction in the track-delivery rates to Norfolk would mean eventually a reduction in the inside-the-Capes rates at that point, which would in turn for competitive reasons result in a demand for a reduction of their inside-the-Capes rates at Baltimore and Philadelphia. (See 256 I. C. C. at p. 448.)

> mont [2] are too high by about 10 cents compared with the prescribed rates to Buena Vista and Charlottesville, and with the reasonable rates herein prescribed to the western portion of the present $2.65 destination group.

On the question of reparation, or past unreasonableness, the Commission made these subordinate findings (256 I. C. C. at pp. 451–452):

> *Reparation.* As stated, complainants assailing the rate of $2.65 seek reparation to the same basis as is found to be reasonable for the future, whereas complainants assailing the rates to Lynchburg and Rivermont seek reparation only in the amount of the 10-cent emergency charge.
>
> The rate of $2.65 is the outgrowth of a rate of $1.50 established in 1906, which, in 1915 when we decided *Bituminous Coal Rates to the Southeast*, 37 I. C. C. 652, applied from the Pocahontas and New River districts to a destination group extending from Lynchburg on the west to Hampton Roads on the east. In that proceeding we found that group to be too large and prescribed a rate of $1.40 to Lynchburg, but denied reparation. Since then in more than a dozen proceedings we have prescribed rates from one or more of these origin groups to a number of destinations to the north, south, and west of the present $2.65 group which, in general, compare favor-

---

[2] Lynchburg and Rivermont lie west of the $2.65 destination territory. The rate from these origins to those points had been $2.15. (See 256 I. C. C. at p. 431.) Such rates are not involved in the present suit.

ably, differences in distance and transportation conditions considered, with this assailed rate to the destination group as it has existed throughout the entire reparation period. Moreover, in *L. D. Wingfield-Hatcher Coal Co.* v. *Chesapeake & O. Ry. Co.*, 191 I. C. C. 644, decided in 1933, division 5 found not unreasonable this same rate of $2.65 from the New River mines on the C. & O. to Richmond, the principal destination in the group. So also, the assailed rate of $2.15 was prescribed to Lynchburg in *Virginia State Corp. Comm.* v. *Norfolk & W. Ry. Co.*, *supra*, and *Staunton Brick Co.* v. *Chesapeake & O. Ry. Co.*, *supra*, in 1932, and to Rivermont in *A. S. Nowlin & Co.* v. *Chesapeake & O. Ry. Co.*, 213 I. C. C. 101, in 1915.

Under the circumstances, the situation here insofar as reparation is concerned is much like that in *Cynthiana Construction Co.* v. *Louisville & N. R. Co.*, 144 I. C. C. 344; *Eastern Livestock Cases of 1926*, 144 I. C. C. 731; *Coal Trade Assn. of Indiana* v. *Baltimore & O. R. Co.*, 185 I. C. C. 225, 190 I. C. C. 743; and *Scott County Milling Co.* v. *Butler County R. Co.*, 194 I. C. C. 763, wherein, in declining to find rates unreasonable in the past, we followed the principle announced most clearly in the second of those reports, page 781, as follows:

"When we are of the opinion that rates have become unreasonable as the result of changes in conditions so gradual that no date can be pointed out upon which they became unreasonable, and the history of the rates is such as to

justify the carriers in believing that they were maintaining rates which had our approval, we have the power to fix the reasonable rates for the future, and, in that "flexible limit of judgment which belongs to the power to fix rates" to refuse to hold the rates unreasonable in the past."

It is true that in authorizing the addition of the 10-cent emergency charge we pointed out in *General Commodity Rate Increases, 1937, supra*, at page 745, that the sole justification for increasing the bituminous-coal rates of the Pocahontas lines "lies in the needs of other carriers." But the rates here assailed are only a few of a large body of rates maintained by these defendants to which we have authorized the addition of that emergency charge as well as, for a time, the 5-cent general increase; and it is still true that "the history of the rates is such as to justify the carriers in believing that they were maintaining rates which had our approval." Accordingly, the principle above quoted is applicable here.

From these findings, the Commission concluded that the rates assailed were not unreasonable in the past, and would not be unreasonable in the future, as to points in the $2.65 destination group east of a line drawn from north to south through Doswell, Richmond, Hopewell, Petersburg, Jarrott, and Emporia, Virginia. It further concluded that for the future the assailed rate from the base groups would be unreasonable to points in the $2.65 destination group on the west of that line to the extent that it might exceed $2.45, and to Lynchburg and River-

mont, Virginia, to the extent that it might exceed $2.05. The Commission assumed that the defendants would desire to continue to maintain the present origin differentials and, accordingly, it made no finding for the future as to the rates from the differential districts. To the foregoing rates, the Commission permitted the addition of the 10-cent emergency charge previously authorized in *General Commodity Rate Increases, 1937*, 223 I. C. C. 657. It stated that an appropriate order would be entered.

The evidence upon which the Commission's conclusions were based was not introduced before the District Court, in view of which it must be assumed that the findings of the Commission are supported by substantial evidence. *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 125; *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, 286. Plaintiffs' attack must therefore be limited to the proposition that the Commission's report on its face is unlawful because its conclusion that the rates were not unreasonable in the past is, in view of its contrary conclusions as to the future, arbitrary and unsupported by essential findings.

In a very full opinion, the lower court concluded that it had no jurisdiction to entertain the suit, because of its views that a party who has sought reparation before the Commission which has been denied, cannot bring a suit in a three-judge court under the Urgent Deficiencies Act to set aside the order of denial. *Standard Oil Co.* v. *United States*, 283 U. S. 235, 240–241; *Rochester Telephone Co.* v.

United States, 307 U. S. 125, 140, note 23; *Atlantic Lumber Corporation* v. *Southern Pacific Co.*, 47 F. Supp. 511, 513 (D. Ore.); *Brady* v. *Interstate Commerce Commission*, 43 F. 2d 847, 850–851 (N. D. W. Va.), affirmed *per curiam*, 283 U. S. 804; *Allison & Co.* v. *United States*, 12 F. Supp. 862, 863–864, (S. D. N. Y.), affirmed *per curiam*, 296 U. S. 546.

Secondly, assuming only *arguendo* that it had jurisdiction, the Court considered and disposed of the case on the merits. It held that there is nothing inconsistent in the Commission's holding that the rates were unreasonable for the future, but that the same rates were not unreasonable as to the past. *Baer Bros. Co.* v. *Denver & Rio Grande R. R. Co.*, 233 U. S. 479, 486. The Court also reviewed the findings of the Commission and found that they were sufficient, and concluded that the plaintiffs did not sustain the heavy burden imposed on them of showing the order was invalid.

It is submitted that the conclusions of the District Court are sound, and that this appeal presents no substantial question requiring oral argument, and that the decree of the District Court should be affirmed without argument.

1. While plaintiffs' complaint attacked the Commission's order only insofar as it failed to conclude that the rates found unreasonable in the future were equally unreasonable in the past, and sought to have the case remanded to the Commission for further action, the obvious ultimate aim of this suit is to secure the reparations refused by the Commission.

Such being the nature of the suit, we submit that the provisions of Section 9 of Part I of the Interstate Commerce Act (49 U. S. C. 9) prevented the District Court from assuming jurisdiction. We think that where a party has elected to seek reparations from the Commission and an order has been entered which denies reparations, Section 9 bars a suit before a three-judge district court sitting under the Urgent Deficiencies Act to set aside such order. This is evident from the decision in *Standard Oil Co.* v. *United States*, 283 U. S. 235. There suit had been brought under the Urgent Deficiencies Act to annul an order of the Commission dismissing two complaints to recover damages on the ground that the legally applicable rates had been applied to the transportation in question. *Standard Oil Co.* v. *A. T. & S. F. Ry. Co.*, 139 I. C. C. 297. The petition also prayed that the Commission should be directed to enter an order granting the prayer of the complainants, finding that the petitioner had been overcharged by an amount equal to the difference between the rates assessed and the lawfully applicable rates, and requiring a further hearing, if necessary, to determine the damages. The Court held that the provisions of Section 9 of the Act, requiring election of remedies, barred the assumption of jurisdiction. As the Court said (283 U. S. 235, 240–241):

> * * * Section 9 of the Interstate Commerce Act, c. 104, 24 Stat. 379, 382; U. S. C. Title 49, Sec. 9, provides that a claim for damages against a common carrier may be brought before the Commission by complaint, or by

an action in a federal district court of competent jurisdiction, but that the claimant or claimants "shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." Having elected to proceed and having proceeded to a determination before the Commission, appellant was, by force of this provision, precluded from seeking reparation upon the same claims by the alternative method of procedure. Compare *Geo. A. Hormel & Co.* v. *Chicago, M. & St. P. Ry. Co.*, 283 Fed. 915, 918.

It is true that appellant sought to enjoin and set aside the order of the Commission, but only as a preliminary step toward obtaining, by a decision upon the merits of the claims, the same relief it failed to secure from the Commission. This is made clear by the prayer of the petition, already quoted, namely, that the Commission be directed by the court to grant the prayer of the complaints; find that petitioner has been overcharged to the extent set forth; and order a further hearing, if necessary, to determine the amount to be paid by way of reparation. It is of no importance that the adjudication sought is to take the form of a direction to the Commission to grant the prayer of the complaints filed before that body, etc., instead of a plenary judgment to the same end, for the prayer in that form is nothing less than an attempt to avoid the statute by indirection. In substance and in principle the claim before the Commission and the claim before the court

were the same, and the district court was without authority to entertain the controversy. It is hardly necessary to add that, since Sec. 9 contemplates that the jurisdiction in such cases shall be exercised by the federal district courts as ordinarily constituted, the specially constituted court is without jurisdiction to dispose of an action under that section even if brought in the district court in the first instance.

While *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, has since greatly circumscribed the negative order doctrine mentioned in the *Standard Oil* case, the Court in the *Rochester Telephone* case made it plain that the *Standard Oil* case was primarily based on Section 9 rather than the negative order doctrine, and was still good law. Thus the Court said in a footnote (307 U. S. 125, 140) that "*Standard Oil Co.* v. *United States* [283 U. S. 235] held not reviewable the action of the Commission refusing to grant reparation, but the main basis of the decision was not the 'negative order' doctrine, but the statutory scheme dealing with reparations." That the *Standard Oil* case was not reversed by the *Rochester Telephone* decision and that under it a three-judge court cannot review a Commission order, such as the present, denying reparation, was also made manifest in the more recent *Atlantic Lumber Corporation* case, 47 F. Supp. 511, 514 (D. Ore.). And it is clear from the decision of the statutory three-judge court in *Allison & Co.* v. *United States*, 12 F. Supp. 862, 863–864 (S. D. N. Y.), affirmed *per curiam*, 296 U. S.

546, that under the doctrine of the *Standard Oil* case, a court under the Urgent Deficiencies Act cannot review an order of the Commission denying reparation, even though the complaint before the court does not request damages.

2. Plaintiffs' contentions that the Commission's report does not contain adequate findings and that its findings do not support its ultimate conclusion that the assailed rates were not unreasonable for the past, must be rejected. The question of reasonableness of a rate is an ultimate question of fact entrusted, like many other questions, to the expert judgment of the Commission. *E. g., Cincinnati, New Orleans & Texas Pacific Ry.* v. *Interstate Commerce Commission*, 162 U. S. 184, 194, 196; *Illinois Central Railroad* v. *Interstate Commerce Commission*, 206 U. S. 441, 455, 456. In determining the validity of the Commission's action under such circumstances the judicial inquiry is exhausted when it is determined that there is a rational basis, and substantial evidence to support the conclusions approved by the Commission. *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, 286–287; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145–146; *Barringer & Co.* v. *United States*, 319 U. S. 1, 6–7. Here, even the question of substantial evidence is not open to the court, because plaintiffs have not introduced the record before the Commission.

We submit that the Commission's subordinate findings (set forth *supra*) with respect to the past reasonableness of the rates are adequate to indicate

the basis for its ultimate conclusion that the rates were not unreasonable, and they afford a rational basis for such conclusion.

The Commission, in the portion of its report entitled "Discussion and Findings" (256 I. C. C. at pp. 451–452), dealt with the question of reparation. There the Commission described the history of the rates and stated that in 1933 it had found not unreasonable the assailed rate of $2.65 from the New River mines on the C. & O to Richmond, the principal destination in the destination group. It found too that in more than a dozen proceedings it had prescribed rates from one or more of these origin groups to destinations to the north, south, and west of the present $2.65 group which, in general, compare favorably, differences in distance and transportation conditions considered, with the assailed rate to the destination group as it had existed throughout the entire reparation period. Also it found that the history of the rates was such as to justify the carriers in believing that they were maintaining rates which had its approval. Finally, it concluded that under such circumstances, it had the power to fix reasonable rates for the future, yet at the same time, in that "flexible limit of judgment which belongs to the power to fix rates", to refuse to hold the rates unreasonable in the past, as it had done in a number of other similar cases. These findings are adequate for they clearly indicate the basis for the Commission's conclusion that the rates were not unreasonable for the past.

Moreover, the findings afford a rational basis for the Commission's ultimate conclusion. Plaintiffs contend, to the contrary, that the Commission's action is arbitrary because, from evidence relating to the past it found that "measured by cost alone this rate is much too high" and concluded that for the future the rate would be unreasonable. This conclusion is said to be inconsistent with the contrary conclusion that despite the same past costs the rate was not unreasonable for the past. This contention fails to take account of the fact that the Commission in determining the reasonableness of a rate for the past and in awarding reparation performs a different function from that of determining the reasonableness of a rate for the future and prescribing a rate for the future. In fact, while the power to grant reparation was given to the Commission in the original Interstate Commerce Act of 1887, the Supreme Court held that such Act did not confer the power to prescribe reasonable rates for the future, and it was not until the Hepburn Act of June 29, 1906 (34 Stat. 584) that the Commission was given that power in the present Section 15 (49 U. S. C. 15). *Cincinnati, New Orleans & Texas Pacific Ry.* v. *Interstate Commerce Commission*, 162 U. S. 184; *Brady* v. *Interstate Commerce Commission*, 43 F. 2d 847, 850–851 (N. D. W. Va.), affirmed *per curiam*, 283 U. S. 804. This Court has recognized that reparation need not be ordered for the past even though a new rate is established for the future. *Baer Bros. Co.* v. *Denver & R. G. R. R.*, 233 U. S. 479, 488.

In view of the quasi-judicial nature of the Commission's function in considering the past reasonableness of the rates, it could, just as a court would normally do, properly consider its past decisions involving the same or a closely related situation as precedents. It was also entitled to attach much weight to the fact that the rates here involved compared favorably with the rates found reasonable by it in many past decisions for application to points north, south, and west of this destination area. *Arizona Grocery Co.* v. *Atchison Ry.*, 284 U. S. 370, 389. It is well settled that there is a "zone of reasonableness," and that the Commission has much discretion in determining whether a particular rate is reasonable. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506. Under the circumstances here, its determination that this rate was not unreasonable for the past was well within the legitimate bounds of that discretion.

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

(Sgd.) Charles Fahy
CHARLES FAHY
Solicitor General.

(Sgd.) Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

APRIL 1945.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1287

ASHLAND COAL AND ICE COMPANY, INC., ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

STATEMENT AS TO JURISDICTION AND MOTION TO AFFIRM

FRANK W. GWATHMEY,
HORACE L. WALKER,
LAWRENCE CHAFFEE,
HENRY W. OPPENHIMER,
D. LYNCH YOUNGER,
CHARLES CLARK,
JOHN C. DONNALLY,
Counsel for Appellees,
Atlantic Coast Line Railroad Company, et al.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1287

ASHLAND COAL AND ICE COMPANY, INC., ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.

STATEMENT OF APPELLEE RAILROADS AS TO JURISDICTION AND MOTION TO AFFIRM

Filed April 21st, 1945

Appellee railroads [1], interveners as parties defendant below, pursuant to Rule 12, Paragraph 3 of the Rules of the Supreme Court of the United States, respectfully move that the decree of the specially constituted District Court of three judges [2], dated February 14, 1945, from which this direct appeal is taken, be affirmed. The said decree dis-

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[1] Atlantic Coast Line Railroad Company, The Chesapeake and Ohio Railway Company, Norfolk and Western Railway Company, Richmond, Fredericksburg and Potomac Railroad Company, Seaboard Air Line Railway (L. R. Powell, Jr., and Henry W. Anderson, Receivers), Southern Railway Company, and The Virginian Railway Company.

[2] The District Court was convened pursuant to the Urgent Deficiencies Act of October 22, 1913 (28 U. S. C. Sec. 47).

missed appellants' (plaintiffs below) complaint to set aside in part a report (256 I. C. C. 429) and order of the Interstate Commerce Commission entered November 8, 1943, in its complaint dockets Nos. 27648, et al., styled *Ashland Coal & Ice Company, Inc., et al.*, v. *Atlantic Coast Line Railroad Company, et al.* The decree was based upon the District Court's findings that the case was not within its jurisdiction and that, even if jurisdiction was assumed, the complaint should be dismissed on the merits.

As grounds for this motion these appellees rely upon the grounds set forth in the motion to affirm filed herein by the United States and the Interstate Commerce Commission, appellees, on April 12, 1945, and upon such supplemental and further grounds as they hereinafter respectfully show unto this Court.

Appellants, receivers of bituminous coal at Richmond and certain other points in the State of Virginia north, south and west of Richmond, were among parties complaining before the Commission that certain freight rates published and applied by these appellees for the transportation of bituminous coal, in carloads, via interstate routes from mines in West Virginia, Kentucky and Virginia to points in a large area in eastern Virginia (Richmond was the approximate geographic center of the area), grouped for rate-making purposes into a single destination freight rate group[3] known as the "$2.65 group," had been, were and for the future would be unreasonable in violation of Section 1 of the Interstate Commerce Act (49 U. S. C. 1).[4]

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[3] From any point of origin, the same rate applied to all points in the destination group.

[4] The rates to points in a second destination group, known as the Lynchburg group, also were at issue upon separate complaint (Docket No. 27739) consolidated for hearing and decision with the complaints attacking the rates to the $2.65 group. Insofar as they pertain to rates to the Lynchburg group, the Commission's report and order are not here assailed.

The complaining parties sought reparation on past shipments and reduced rates for future application. In the report under attack, the Commission found as to the past that none of the assailed rates had been unreasonable and, accordingly, that reparation should be denied, and for the future that the existing destination group was too large and should be divided, that to points in the eastern division, known as the new "Norfolk group," the assailed rates were not unreasonable, but that to points in the western division, known as the new "Richmond group" and including all of the points at which appellants are located, the assailed rate of $2.65 per net ton [5] from points in the base origin groups [6] would be unreasonable to the extent that it exceeded a rate of $2.45 per net ton. The order under attack simply gave effect to the latter finding. Only the $2.65 base rate is involved in this suit.

Appellants brought this suit to set aside the report and order insofar as the Commission failed to hold that the rates found unreasonable for the future were not equally unreasonable in the past. They alleged (a) that the Commission acted arbitrarily in drawing from the "same

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[5] Pursuant to authority granted by the Commission in *General Commodity Rate Increases, 1937,* 223 I. C. C. 657, the rate was increased 10 cents effective November 15, 1937. A further increase of 5 cents was made effective March 18, 1942, under the authority granted by the Commission in *Increased Railway Rates, Fares and Charges, 1942,* 248 I. C. C. 545. The latter increase was removed effective May 15, 1943, pursuant to a further report and order in that proceeding, 255 I. C. C. 357. These were general revenue cases and related to the entire railroad rate structure throughout the country. Coal rates to Virginia were not treated separately.

Throughout its report here assailed, the Commission referred to the rates excluding the general increases. The Commission's practice will be followed in this motion.

[6] The points of origin also were grouped for rate-making purposes. From all points in several origin groups known as the base groups to all points in the destination group a rate of $2.65 applied. Higher rates applied from the other origins embraced in several so-called differential origin groups.

mass of evidence" different conclusions respecting the measures of reasonable rates in the past and of reasonable rates for the future, although in the proceedings before the Commission these same parties had contended, *inter alia*, that the evidence would support findings that the destination group should be divided, but only for the future, and that a maximum reasonable rate for future application to points in the western division should be at least 19 cents per net ton lower than the rate found as maximum reasonable in the past, and (b) that in denying reparation the Commission erred as a matter of law by substituting a supposed rule of damage for its function of ratemaking. None of the evidence before the Commission, comprising some 1300 typewritten pages of testimony and some 254 exhibits,[7] was submitted to the court below. Appellants relied largely upon the face of the Commission's report to support their allegations of arbitrary action and misconstruction of the authority conferred upon the commission by the statute. Defendants questioned the jurisdiction of the court to consider the issues presented, denied appellants' allegations, showed that the Commission had been faced with two distinct questions, reasonable rates in the past to the $2.65 destination group as a unit and reasonable rates for the future to the new divisions of the old group, and pointed out that the report contained a separate administrative determination of each question, supported by essential basic findings, and an adequate rational basis for the assailed conclusion of past reasonableness, requiring a denial of reparation.

The District Court considered all of the issues and found against appellants on each. The opinion of the court reflects careful consideration of the evidence before it and the contentions of the parties. Its conclusions were ra-

[7] See paragraph VIII of Commission's answer.

tional. These appellees believe that there is such lack of substance in the questions here raised by appellants as not to require oral argument before this Court.

(a) Jurisdiction

The ultimate objective of this suit is the recovery of reparation. Appellants elected to pursue their remedy before the Commission. Reparation there having been denied, these appellees respectfully submit that, under the provisions of Section 9 of Part 1 of the Interstate Commerce Act (49 U. S. C. 9), the District Court of three judges was without jurisdiction to entertain this suit. See *Standard Oil Co.* v. *United States,* 283 U. S. 235, 240-241; *Rochester Tel. Corp. v. United States,* 307 U. S. 125, 140, note 23; *Atlantic Lumber Corporation* v. *Southern Pacific Co.,* 47 F. Supp. 511, 513 (D. Ore.); *Brady* v. *Interstate Commerce Commission,* 43 F. (2d) 847, 850-851 (N. D. W. Va.), affirmed *per curiam* 283 U. S. 804; *Allison & Co.* v. *United States,* 12 F. Supp. 862, 863-864 (S. D. N. Y.), affirmed *per curiam,* 296 U. S. 546. As this point is fully covered in the motion to affirm filed herein by the appellees, United States and Interstate Commerce Commission, the railroad appellees deem further argument of the proposition unnecessary.

(b) Merits

The functions of determining whether a rate, was, is or will be unreasonable and to what extent, are administrative functions expressly reserved for the Commission. *Texas & Pac. Ry. v. Abilene Cotton Oil Co.,* 204 U. S. 426; *Illinois Cent. &c. R. R.* v. *Inter. Com. Comm.,* 206 U. S. 441; *Inter. Com. Comm.* v. *Illinois Cent. R. R.,* 215 U. S. 452, 470; *Int. Com. Comm.* v. *Union Pacific R R.,* 222 U. S. 541, 550; *Interstate Commerce Commission* v. *Jersey City,* 322 U. S. 503, 512-513, 523. A court may not substitute its judgment

for that of the Commission as to the reasonableness of a rate. *I. C. C.* v. *Inland Waterways Corp.*, 319 U. S. 671, 691; *Scripps-Howard Radio* v. *Comm'n.*, 316 U. S. 4, 10; *Rochester Tel. Corp.* v. *U. S., supra,* 139; *United States* v. *New River Co.*, 265 U. S. 533, 542.

Indeed, in any proceeding wherein a court is called upon to review an order of an administrative body such as the Interstate Commerce Commission, the range of possible issues is closely circumscribed. "Only questions affecting constitutional power statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable." *Rochester Tel. Corp.* v. *U. S., supra,* 140. "To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province." *Virginian Ry.* v. *United States,* 272 U. S. 658, 663. To like effect are *Interstate Commerce Commission* v. *Jersey City, supra,* 512; *I. C. C.* v. *Inland Waterways Corp., supra,* 619; *Georgia Comm.* v. *United States,* 283 U. S. 765, 775; *Western Chem. Co.* v. *United States,* 271 U. S. 268-271; *New England Divisions Case,* 261 U. S. 184, 204.

Where, as here, the evidence submitted to the Commission is not before the reviewing court, the range of possible issues is further limited. This was clearly stated by Mr. Justice Cardoza in *Mississippi Valley Barge Co.* v. *United States,* 292 U. S. 282, 286, as follows:

> "The settled rule is that the findings of the Commission may not be assailed upon appeal in the absence of the evidence upon which they were made. *Spiller* v. *A. T. & S. F. Ry. Co.*, 253 U. S. 117, 125; *Louisiana & Pine Bluff Ry. Co.* v. *United States,* 257 U. S. 114, 116; *Nashville C. & St. L. Ry. Co.* v. *Tennessee,* 262 U. S. 318, 324; *Edward Hines Trustees* v.

> *United States*, 263 U. S. 143, 148; *Chicago, I. & L. Ry. Co.* v. *United States*, 270 U. S. 287, 295. • • • The findings in the report being thus accepted as true, there is left only the inquiry whether they give support to the conclusion. • • • The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

See also, *Interstate Commerce Commission* v. *Jersey City*, *supra*, at p. 512; *Lubetich* v. *United States*, 315 U. S. 57, 58; *United States* v. *Lowden*, 308 U. S. 225, 231; *Rochester Tel. Corp.* v. *U. S.*, *supra*, 146.

Under these established principles governing the scope of judicial review of administrative determinations, the District Court was required to determine merely whether the Commission's report disclosed a rational basis of essential findings supporting the assailed conclusion of past reasonableness.

In its report (256 I. C. C. 429), the Commission first reviewed the history of the litigation, the contentions of the parties and the evidence before it, and thereafter, in a separate section entitled "Discussion and Findings" (pp. 451-2), set out certain basic findings drawn from the evidence. Following two paragraphs containing the basic findings from which it determined the question of reasonable rates for the future, the Commission set forth at greater length, in a subsection headed "Reparation," its basic findings relating to the question of past reasonableness and its conclusion here assailed in part. Among the latter basic findings were the following: (a) "The rate of $2.65 is the outgrowth of a rate of $1.50 established in 1906, which in 1915, when we decided *Bituminous Coal Rates to the Southeast*, 37 I. C. C. 652, applied from the Pocahontas and New River districts (the base origin groups) to a destination group extending from Lynchburg

on the west to Hampton Roads on the east"; (b) "In that proceeding we found that group to be too large and prescribed a rate of $1.40 to Lynchburg, but denied reparation"; (c) "Since then in more than a dozen proceedings we have prescribed rates from one or more of these origin groups to a number of destinations to the north, south, and west of the present $2.65 group which, in general, compare favorably, differences in distance and transportation conditions considered, with this assailed rate to the destination group as it has existed throughout the entire reparation period"; (d) "Moreover, in *L. D. Wingfield-Hatcher Coal Co.* v. *Chesapeake and O. Ry. Co.*, 191 I. C. C. 644, decided in 1933, division 5 found not unreasonable this same rate of $2.65 from the New River mines on the C. & O. [the base origin group on that railroad] to Richmond, the principal destination in the group."

In the absence of the evidence from which the Commission drew these basic findings, the District Court, relying upon the doctrine of *Miss. Valley Barge Co.* v. *U. S., supra,* accepted them as true. It concluded that these findings met the test of "basic" or "essential" findings. See *United States* v. *B. & O. R. Co.*, 293 U. S. 454, 465; *Penn. Anthracite Mining Co.* v. *Delaware & H. R. Corp.*, 16 F. Supp. 732, 735, aff'd., 91 F. (2d) 634, cert. den., 302 U. S. 756; *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 427-28; *Visceglia* v. *United States*, 24 F. Supp. 355, 357. Moreover, it recognized that these basic findings afforded rational support for the Commission's conclusion that the assailed rates had not been unreasonable in the past. As the court pointed out, "The process of rate making cannot be solved by the rigid application of algebraic formulae or reduced to the monotonous regularities of mechanical instrumentalities." See also *Board of Trade* v. *U. S.*, 314 U. S. 534, 546, and *I. C. C.* v. *U. P. R. Co., supra,* 550, cited in the District Court's opinion.

The mere circumstance that the Commission did not find the $2.65 rate unreasonable in the past to the points in the new Richmond group to which it found that rate unreasonable for the future affords no indication of arbitrary action. The very acts of prescribing reasonable rates for the future and of determining reasonable rates in the past as the basis for awarding reparation are separate functions, one *quasi*-legislative and the other *quasi*-judicial, involving the determination of matters essentially different. *Baer Bros.* v. *Denver & R. G. R. R.*, 233 U. S. 479, 486; *Gt. No. Ry* v. *Merchants Elev. Co.*, 259 U. S. 285, 291; *Arizona Grocery* v. *Atchison Ry.*, 284 U. S. 370, 388; *Morgan Co.* v. *Great Northern Ry.* (C. C. A. 7th, 1923), 285 Fed. 876, 877; *George Allison & Co.* v. *Interstate Commerce Com'n.*, 107 F. (2d), 180, 186, cert. den., 309 U. S. 656. The District Court recognized the clear line of demarcation between these separate functions. Moreover, the case last cited effectively disposes of the plaintiff's contention that the Commission acted arbitrarily. In that case the Commission found the rates there assailed unreasonable in the past to the extent that they exceeded 120 per cent. of first-class, and that they would be unreasonable for the future to the extent that they exceeded 105 per cent. of first-class. In determining whether these allegedly "opposing conclusions" respecting past and future reasonableness were so arbitrary as to require correction, Groner, C. J., with whom Miller and Rutledge, JJ., concurred, said in part, 107 F. (2d) at p. 186:

> "We find nothing arbitrary or capricious in the Commission's report. In this regard, counsel for shippers say the finding that prior to March 3, 1933, the assailed rates were unreasonable to the extent that they exceeded 120 percent, and that thereafter they were unreasonable to the extent that they exceeded 105 per cent, is a mere arbitrary conclusion unsupported by evidence

and, therefore, mere surplusage. In this view, they say the conclusion should be disregarded and the finding on the basis of 105 per cent should be considered as applicable to both periods. * * *.

After distinguishing the case cited by counsel for the shippers and reviewing the findings made in the Commission's first and second reports, the court went on to say:

> "The November 7th report of the Commission may be subject to the criticism that no particular facts are stressed to explain the reason for the difference in rates in the past and in the future. But the findings, so far as they applied to the past, were made, not for the purpose of fixing rates, but solely to measure reparation. *There was nothing arbitrary in this, since the Commission is not required to award reparation on the same basis used for future rates. We have seen that the Commission often fixes a new rate without granting any reparation.* In this case it has granted reparation, but not to the full extent of the new rates. Many factors may have entered into this finding. * * *" (Emphasis supplied.)

The above case cannot be distinguished from the instant case on the ground that the Commission's order there assailed awarded some but not all of the reparation sought while the Commission's order here assailed denied all reparation. In the prior related case of *George Allison & Co.* v. *United States*, 12 Fed. Supp. 862, affirmed 296 U. S. 546, Circuit Judge Swan, rendering the unanimous opinion of the three-judge Federal District Court for the Southern District of New York, denying the petition of the same shippers and receivers of strawberries for an order setting aside and annulling that part of the Commission's order wherein reparation had been awarded to a level of rates higher than those prescribed for the future, pointed out (p. 864):

> "* * * There can be no substantial difference between review of an order of the Commission denying a shipper reparation, and review of an order granting some damages but denying the full reparation sought. * * *"

While the separate administrative conclusions of past reasonableness and future unreasonableness were supported by basic findings drawn from the same record, termed by appellants as the "same mass of evidence," it by no means follows that each conclusion was made on the *same* evidence. On the contrary, the section of the report wherein the Commission's basic findings were set out, the section headed "Discussion and Findings," shows clearly that the two conclusions were not drawn from the same evidence.

In determining the two distinct questions before it, the Commission weighed the evidence, drew therefrom the findings of fact which it deemed pertinent to the consideration of each question, and then deduced its ultimate administrative conclusions. There was nothing illogical or arbitrary in the process. See *Cape Fear Rys.* v. *United States*, 7 F. Supp. 429, 431, aff'd, 294 U. S. 693. The rational bases for the conclusions were not destroyed by the mere fact that the Commission did not attach to each bit of evidence equal weight in the determination of the two separate questions.

In language of Mr. Justice Jackson, in *Interstate Commerce Commission* v. *Jersey City*, supra, 513:

> "* * * The Commission considered that it had, and we find no reason to doubt that it had, the evidence before it that was needful to the discharge of its duty to the public and to the regulated railroad."

Of significance also is the fact that when the appellants were before the Commission they suggested different mathematical measures of past and future reasonableness. They

indicated that the $2.65 destination group might be divided for the future and asked the Commission, in such event, to find as maximum reasonable rates for future application to points in the western division, rates at least 19 cents per ton lower than the rates which they asked the Commission to find as maximum reasonable for past application to the same points.[8]

The District Court readily disposed of appellants' contention that the Commission had substituted a supposed "rule of damage" for its elementary duty of passing upon the "reasonableness per se" of freight rates. The contention was based upon a reference in a prior decision, from which the Commission quoted, to a power "to refuse to hold the rates unreasonable in the past" (Report p. 452). When the phrase is read in the light of the context of the entire report, as it must be (See *Mississippi Barge Co.* v. *United States, supra,* page 289), it is seen simply as an expression of the Commission's obligation under the statute to refuse to grant complainants' prayer for a finding of past unreasonableness when the essential basic findings would not pro-

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[8] The positions of the complaining parties is explained in the following statement found on page 431 of the report of the entire Commission, printed as 256 I. C. C. 429:

"Originally, complainants desired a continuation of both the origin and destination groupings. At the further hearing, however, certain of the complainants expressed a willingness to accept a break-up of the destination grouping. It is contended by complainants that at no time should the rate to the $2.65 destination group have exceeded $2.19. They seek, as to the past, rates of $2.19 from the base groups, $2.44 from the origin differential groups, addition of the existing differential from the Kentucky group, and awards of reparation accordingly. Breaking up of the destination group is not advocated by complainants, but if it should be broken they suggest that from the base groups the rate to Norfolk and intermediate points back to the Richmond-Jarratt line should be $2.35 because to prescribe less would be to break down the integrity of the outside-the-capes rates. To the Richmond-Petersburg-Jarratt group they urge that the rate should not exceed $2 and be observed as maximum at intermediate points, with the Lynchburg rate not in excess of $1.75."

vide rational support for such ultimate finding. As Mr. Justice Douglas stated in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602:

> "Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries a heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences."

After quoting this statement, which was further approved in *Interstate Commerce Commision* v. *Jersey City, supra,* 512-13, the District Court properly concluded that the appellants' had not "carried the heavy burden, thus imposed on them, by making a convincing showing that the order of the Commission denying reparations is invalid." This appeal raises no questions not fully disposed of by the District Court.

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

(Sgd.) Frank W. Gwathmey,
Attorney for Atlantic Coast Line Railroad Company, Richmond, Fredericksburg and Potomac Railroad Company, Seaboard Air Line Railway (L. R. Powell, Jr., and Henry W. Anderson, Receivers),
1110 Shoreham Building,
Washington 5, D. C.

[CONTINUED ON NEXT PAGE]

(Sgd.) HORACE L. WALKER,
(Sgd.) LAWRENCE CHAFFEE,
(Sgd.) HENRY W. OPPENHIMER,
Attorneys for The Chesapeake and Ohio Railway Company,
1500 First National Bank Building,
Richmond 10, Virginia.

(Sgd.) D. LYNCH YOUNGER,
Attorney for Norfolk and Western Railway Company,
Roanoke, Virginia.

(Sgd.) CHARLES CLARK,
Attorney for Southern Railway Company,
Washington 13, D. C.

(Sgd.) JOHN C. DONNALLY,
Attorney for The Virginian Railway Company,
Investment Building,
Washington 5, D. C.

No. 1287. ASHLAND COAL & ICE CO., INC. ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Eastern District of Virginia. June 18, 1945. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *Standard Oil Co.* v. *United States*, 283 U. S. 235, 240–41; *George Allison & Co.* v. *United States*, 296 U. S. 546. Dissenting: MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS. *Messrs. Walter M. Evans* and *Harry C. Ames* for appellants. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for the United States et al., and *Messrs. Frank W. Gwathmey, Horace L. Walker, D. Lynch Younger, Charles Clark* and *John C. Donnally* for the Atlantic Coast Line Railroad Co. et al., appellees. Reported below: 61 F. Supp. 708.